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AN ELEMENTARY COMMENTARY
ON
ENGLISH LAW

DESIGNED FOR USE IN SCHOOLS

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"The foundation of every State is the education of its youth"

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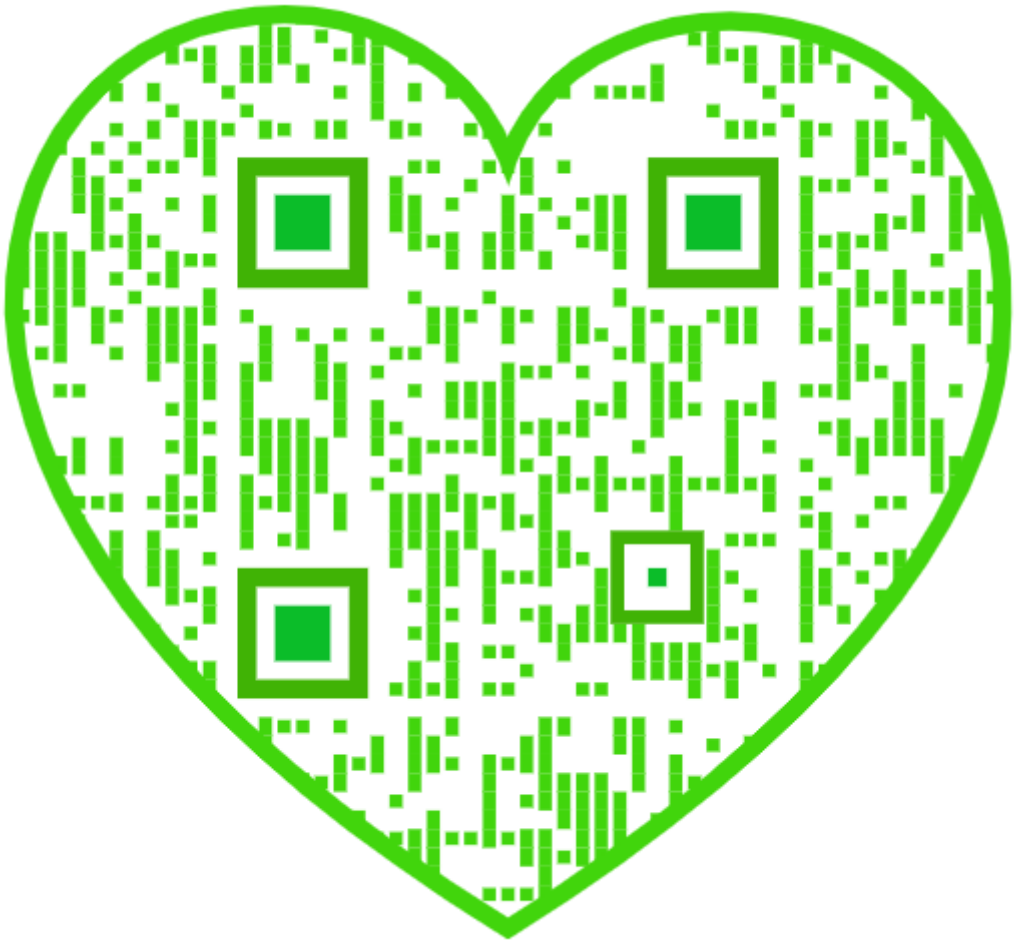

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PREFACE

I HAVE written a good deal in past years for the members of my own profession, for men trained in the science of law, but have long felt a desire to write something for the young; something which may enable the rising generation to acquire a knowledge of the rudiments of the laws of their own country—laws by which we are all governed, and which we all have to obey.

Although this small commentary on English law has been composed chiefly in the interest of boys, it is hoped that, in these times of quickly advancing education, it may be found to be not inappropriate for girls also.

> "For learning, once the man's exclusive pride,
> Seems verging fast towards the female side."

The utility of, indeed the necessity for, some knowledge of law in the young has been dealt with fully in the first chapter of the book.

I have usually given no authorities for my various statements and propositions. The authorities for the same are contained in many ponderous books, to which a reader of this work would have no access.

That such a book as this is necessarily imperfect I shall be the first to acknowledge. A complete acquaintance with any of the subjects, to which only a page or two are here devoted, would necessitate the reading of many volumes known to and studied by lawyers.

All general principles of law ramify into sub-principles, and are subject to exceptions, to most of which it has only been possible to allude in the most cursory way.

The only parts of the book which it is feared may be found difficult, either to master or pupil, are the chapters relating to land.

The land law of England, which has been in the course of development for many centuries, and which exemplifies perhaps better than any other part of the law the English character and traditions, is necessarily abstruse, and certainly not easy to condense. Still it is by no means dry, or its general history and main principles

beyond the powers of somewhat careful study, combined with moderate intelligence.

Bearing in mind that the object of this commentary is not to make boys or girls into lawyers, but only to stimulate in them an interest in the laws of their own country, I venture to express a hope that this book may serve its purpose.

ALFRED HENRY RUEGG

MANOR HOUSE,
UTTOXETER

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AN ELEMENTARY COMMENTARY ON ENGLISH LAW

CHAPTER I

THE NECESSITY OF SOME KNOWLEDGE OF THE LAW

"There is no darkness, but ignorance." "Twelfth Night."

Maxims of the Common law.

"EVERYBODY is presumed to know the law." [1]

"Ignorance of law excuses no one" ("*Ignorantia legis neminem excusat*").

These are maxims of the common law of England, and apply, without qualification or exception, to every English-born subject, as well as to persons who may be naturalized, or even temporarily resident in this country.

It is no defence to any violation of our law to say that it was committed in ignorance, though this may be the entire truth.

Can the maxim that "Everyone is presumed to know the law" be said, in any sense, to be true in fact?

The answer must assuredly be that it is not true.

General ignorance of law.

The ignorance of the great majority of English people concerning the principles on which law is based, the laws of their own country, and the administration of the law, is simply colossal. This ignorance exists even amongst those who have received what is called a "liberal education."

Acquaintance with law confined to lawyers.

With but few exceptions, it is the professional lawyer only who studies and is acquainted with the duties imposed by law upon every citizen, and he alone knows the methods and tribunals by which these duties can be enforced.

[1] A witty American lawyer once said that this maxim applied to every person in England, except the judges, who have to be told what the law is by the advocates.

The rights, powers and obligations appertaining to the ownership of property are the secrets of his profession, and to be learned only by application to him.

Prejudice against lawyers.

It is often said that the lawyer, as such, is not popular in this country, though, like the policeman, he is always eagerly called for when difficulties arise.

It is possible this prejudice is largely due to the complete unfamiliarity of the ordinary layman with even the rudiments of the science on which he so often has to seek assistance. He has generally a vague idea that the lawyer is a necessary nuisance and the law a mass of myriad precedents, often contradictory and somewhat ridiculous, with a procedure highly technical—the whole thing above his comprehension. Consequently, he argues, the sooner he puts his difficulties into "the hands of his lawyer" the better. Not infrequently he cannot even discuss intelligently with his adviser the purpose for which he seeks his aid, or understand the advice which is given to him. Like the ordinary householder who calls in a plumber to deal with pipes and fittings of which he knows nothing, he has to place himself blindfold in his lawyer's hands, and, again as in the case of the plumber, he is generally dissatisfied when presented with the bill.

Often unwise to be one's own lawyer.

It is neither wise nor possible for every man to be his own lawyer. The well-known adage that "He who is his own lawyer has a fool for a client" contains a real element of truth.

In serious difficulties the professional lawyer is indispensable. Moreover, the tendency of the age is to raise the specialist in law as in other sciences.

In matters affecting reputation, or where considerable property is involved, the consequences of mistake or bad advice are so serious that it is false economy not to consult, if possible, the best authority. Lawyers themselves often have to seek the aid of those specially skilled in certain branches of their own profession. Failure in this respect has caused grievous mistakes. Eminent judges, Lords Chancellors and others with extensive knowledge of the principles of law, have lamentably failed when it came to a question of making their own wills.

Still, if the intelligent citizen cannot be his own lawyer, some very elementary knowledge of law may often keep him out of litigation, or even prevent him from committing what the law forbids as criminal.

Some knowledge essential for everyone.

It is not alone, or even mainly to enable him to avoid litigation or crime that the necessity of such knowledge is required. Every schoolboy of the upper or middle classes ought to know that, as soon as he enters on the duties of manhood, whether he engages in business or not, he will be from time to time confronted by problems and questions of everyday occurrence which, without some acquaintance with the law, he will find himself inadequate to deal with or even to understand.

Instances where required.

The young squire, entering on his inheritance, has immediately to discuss such questions as settlements, wills, deeds, leases, etc., and he is generally "at sea" on such subjects. The consequence is that everything has to be left to the agent or lawyer. He contemplates marriage, and is quite in the dark as to the legal effects of such a contract. He knows nothing of the mutual rights of his wife and himself with respect to their property, or his responsibility for his wife's contracts or wrongs.

The young business man or householder is called upon at once to enter into agreements of various kinds; questions arise as to his responsibility to, or for the acts of those whom he employs. If in business he hears of negotiable instruments, bills of exchange, promissory notes, etc., and (unless he has foolishly been in the hands of moneylenders) these terms are mere names to him.

Above and beyond all questions of personal utility, can it be doubted by any intelligent man that some knowledge of the rights and duties which are attached to every citizen by the laws of his country, and which must in a large degree control his actions and define his rights, ought to form a part not alone of a liberal but of a useful education?

Duty to know elements of law.

"It is incumbent upon every man to be acquainted with those laws at least with which he is immediately concerned, lest he incur the censure as well as the inconvenience of living in society without knowing the obligations under which it lays him" (Blackstone).

Blackstone's opinion.

Formerly considered part of a gentleman's education.

In past times such knowledge was thought an essential part of the education necessary for every gentleman. The sons of noblemen and persons of position were generally "entered" in one of the Inns of Court [1] for the purpose of studying law, not so much with a view of becoming barristers, as of acquiring the knowledge which was thought necessary to enable them to fill the positions they would afterwards occupy.

The Inns of Court.

It is true they often did not acquire this knowledge. The legal education given by the Inns of Court until recently was very deficient. Some attempt was made to instruct the "gentlemen of the Inn" in the principles of the Civil law (*i.e.* Roman) and in English law. The names and coats of arms of the "Readers," as they were called, are to be seen to-day in the panels of at all events one of the beautiful Halls of these Societies. Such readings, if attended at all, were not compulsory, and no examination was required. Indeed until the later part of last century a barrister "learned in the law," as he is always addressed, could be called to the Bar without examination or any test of his proficiency in law.

Education in the Inns of Court.

What he was required to do was to eat so many dinners in the Hall of the Society to which he belonged.

Hence the ribald saying that "a student got to the Bar like a rat gets through a cheese, by eating his way through."

This is all changed. The present system of legal education is good and sufficient. It will be alluded to in a later chapter (Chap. IV.).

Study of law by country gentlemen declines.

Unfortunately the system of requiring the sons of the nobility and gentry to study law as a necessary part of their education has to some extent fallen into disuse.

The students of the Inns of Court have of late consisted mainly of those who intend to adopt the law as their profession, prospective journalists, and others who desire the social prestige supposed to belong to gentlemen who have been "called to the Bar."

A revival of the old system under the present mode of education would be very advantageous.

A still further reason why some knowledge of the principles of law should be acquired in early life is that

[1] "Inns of Court," see *post* page 55.

most boys—and we may now perhaps add girls—educated in the Public and High Schools, look forward to taking some part in the management of their town or county, it may be as magistrates, as guardians, or councillors.

After the recent world upheaval, even greater interest in public matters will be expected from the young who possess social and educational advantages. It is believed this expectation will not be disappointed.

The magistrate has extensive legal powers. Liberty and property often depend upon his right judgment.

A county or borough councillor also has often to decide difficult questions involving legal rights and responsibilities.

Ought such persons to be entirely dependent on the advice of their law clerk ? Surely not.

Elementary law only necessary.

It cannot be expected that they should know all the nice decisions which have been pronounced on Magisterial and Municipal law, but they undoubtedly ought to possess the knowledge which will enable them to understand the decisions cited before them, and to appreciate the distinction in legal principles on which such decisions are based.

As a rule they are absolutely without this knowledge. Magistrates and councillors do excellent unpaid work in the country, which is recognized and appreciated, but can it be doubted that this work would be still more valuable if they themselves brought to it some acquaintance with the law which they have to administer or consider.

The cases and circumstances where legal knowledge is wanting and where it would be useful, could be infinitely prolonged.

Study of law wrongly thought to be uninteresting.

Apart from the foregoing, a rudimentary knowledge of law will be useful if only to assist in destroying the common idea that the study of law is dry and uninteresting.

Lawyers and the law have from the earliest time furnished a favourite butt for wits. Such expressions as—" the glorious uncertainty of the law," " the law a bottomless pit," " the law's delay "—to say nothing of Mr Bumble's comprehensive definition—" the law is a

ass"—are known to everyone, and far too readily accepted.

The law is not dull, it is only supposed to be so. Anyone who has, with intelligence, devoted even a short time to its study will generally admit that he finds the pursuit a useful mental training, and he often becomes fascinated with his subject.

Why not taught in in schools?

If the foregoing remarks are true, or partly true, why is it that law is not included in the curriculum of our schools? This question has often been asked. No very satisfactory answer has been given.

Explanations have been offered, such as—that the masters feel themselves incompetent to teach it; that it is beyond the understanding of young lads; that the study is too strictly professional; that it involves considering subjects that should not be known to boys; that at most but a smattering can be given, and "a little learning is a dangerous thing," etc., etc.

Reasons against teaching law considered.

Such explanations cannot be regarded as satisfactory.

The masters in the English schools are men of high intellect and quite capable of acquiring this knowledge, if they have not already got it, at small expenditure of time.

Is law beyond the understanding of young lads? If the author may for a moment become personal, he would say that he has made a point of discussing it with many boys, generally with reference to the meaning of law terms of everyday use, or the constitution and jurisdiction of the Courts of Justice. Far from finding them unable to understand the subject, his experience is that when put before them in simple words they appreciate it readily, and take keen interest in it.

The explanation that the subject matter forms the knowledge of a learned profession does not seem satisfactory. Such an argument would exclude any acquaintance with the laws of health, or the principles of religion, because doctors and divines exist.

Ought boys to know law?

Neither does the study involve consideration of what should not be known to boys. The subjects pointed at in this explanation—which are an almost infinitesimal portion of the whole law—need hardly be touched upon.

A little law not dangerous.

Pope's oft-quoted tag, "A little learning is a dangerous thing," certainly furnishes no satisfactory explanation. If mistakes have occurred owing to knowledge of law being small, many more have resulted from the total ignorance of it. A little learning—a very little—is all that anyone can acquire.

No real prejudice against the teaching.

There is no evidence that any real prejudice exists against teaching law in the schools. Its omission is more probably due to the spirit of conservatism which has long controlled English education; the distaste of innovation, which feeling, though not without its advantages, is thought by some to have been carried too far.

Object of this book.

This short Commentary has been compiled with some hope of showing those who are responsible for education that the adoption of the study of law is not too drastic an innovation; or at all events that the experiment may without much risk be tried. It is confidently believed that such an experiment would not be found to be unattended with good results.

CHAPTER II

OF THE NATURE OF LAWS, AND THE COMPONENT PARTS OF ENGLISH LAW

There are in nature certain fountains of justice, whence all civil laws are derived. LORD BACON

Definition of "Law."

BLACKSTONE in his celebrated "Commentaries on the Laws of England," first published in 1765, defines the word "Law" thus: "that rule of action which is prescribed by some superior and which the inferior is bound to obey."

The same authority speaks of law in its widest sense as being "the Will of the great Creator of mankind, to which all his subjects must conform." This Divine Will or the part of it not directly revealed in the Scriptures, he calls "the Law of Nature." This expression has been severely criticized.

Principles of the law of Nature.

The three great principles of the Law of Nature, and indeed of revelation, are said to be: *To live honestly*; *to injure no one*; *to give to every one his due.*

The same principles are declared in the Civil (Roman) law, where they are stated in these words: "*Juris præcepta sunt hæc, honeste vivere, alterum non lædere suum cuique tribuere.*"

THE CIVIL OR ROMAN LAW

Note.

Roman civil law.

Although English law alone is dealt with in this book, it is necessary to make a short digression to explain what is meant by the Civil law, for the expression "Civil law" must from time to time be used.

Justinian.

The Roman Emperor Justinian, A.D. 525–565, is always known as the Great Lawgiver, because he first collected and propounded the law of the Roman Empire. Consequently when you see the expression "Civil law," the

Roman law, or the law collected and propounded by Justinian, is always meant.

The laws of Justinian comprise (*a*) "the Code," (*b*) "the Digest" (or Pandects), (*c*) "the Institutes," (*d*) the Novel Constitutions" (*Novellæ Constitutiones*). The law of Justinian.

The Code was a code of law compiled by the Emperor Theodosius, A.D. 438, which was a collection of all the Imperial constitutions then in force. A Constitution meant a declaration of the will of the Roman Emperor which, *ipso facto*, had the force of law. Justinian brought this Code up to date, and it was henceforth known as his Code. The "Code."

The Digest, or Pandects, was a collection of Roman laws prepared by Tribonian, a great lawyer, in fifty books. The "Digest."

The Institutes is really an elementary code of the Roman law, largely taken from a code of law by a former writer named Gaius. The "Institutes."

The Novel Constitutions were such declarations of law as Justinian himself might afterwards publish.

This body of law was declared to be—and that it should continue to be—the "civil law" of the Roman Empire. What composes the Civil law.

Note.

At the present day our University Degree of Doctor of Civil Law, D.C.L., is conferred on persons who have shown knowledge of the Civil or Roman law.

The foundations of law are by Justinian declared to be: the law of Nature; the law of Nations; and the private law of the Romans (*lex naturæ—jus gentium—jus civile*).

Blackstone as the foundations of the English law follows the same definitions, though he does not always use the expressions in the same sense in which they are used in the Civil law. Foundations of English law.

He speaks of the *lex naturæ* as the will of the Creator, not directly revealed in the Bible. The Civil law defines it as "the law which Nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the air, the earth, or the sea." The law of Nature.

In this wide sense the law of Nature is "the expression of right reason inherent in nature and man, and having a binding force as law."

The law of Nations, or *jus gentium*.

Blackstone calls the "law of Nations" the law which has arisen to regulate the mutual intercourse of separate states and nations.

It is called in the Civil law, "the laws found to be common to mankind, that which natural reason appoints for all mankind obtains equally among all nations and is called 'the law of Nations' (*jus gentium*) because all nations make use of it."

Gaius, an earlier writer, upon whose book as we have said the Institutes of Justinian are largely based, gives only two sources of law. He says, "All states use in part their own particular law, and in part the law common to mankind."

The national law of a State.

What in the Civil law is spoken of as the *jus civile*, or the particular laws of Rome, is called by Blackstone "The Municipal law of the State," meaning by municipal the national law of England made by the supreme power in the State.

Definition of national law.

He defines the particular law of a State in these words—"a rule of civil conduct prescribed by the supreme power in the State."

He then enlarges upon his definition, pointing out:

Must be a rule.

1. That it must be a "rule," permanent, uniform and universal. Not advice which may or may not be followed, but a rule which *must* be followed.

And of civil conduct

2. A rule "of civil conduct" as opposed to a rule of morals or of faith.

And prescribed, or notified.

3. "A rule prescribed," *i.e.* notified to those who have to obey it. This notification may be by tradition—the Common law is supposed to have been at one time notified by tradition—by proclamation, or in writing, as in the case of Acts of Parliament.

And notified by the supreme power in the State.

4. "Prescribed by the supreme power in the State," for law, at all events new law, can only be prescribed by the supreme power of the State for the time being, in other words, by the governing power of the State, whatever that power may be.

Divisions of the English Law

Whatever may be said to be the foundations of law generally, the law of England as it exists to-day consists of two great divisions : Divisions of English law.

I. The Statute Law (*Lex Scripta*).
II. The Common Law (*Lex Non-scripta*).

A short explanation of each of these component parts of English law is necessary.

(1) *Statute law.*—Since Parliamentary government was fully established Statute law means the Acts of Parliament passed by the House of Lords and House of Commons, and assented to by the King. These Statutes have always necessarily been in writing or print, and thus collectively are called the *Lex Scripta.* Statute law.

Every Act of Parliament begins in this manner : Acts of Parliament.
" Be it enacted by the King's (or Queen's) Most Excellent Majesty, by and with the consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows "

The words " by the authority of Parliament " have appeared regularly in the Statutes since the year 1445.

The lords spiritual and temporal, and the Commons are called the " three estates of the realm," meaning three orders or classes forming part of the " body politic " and sharing in the Government. Estates of the realm.

The oldest Act of Parliament now extant in the Statute Books is the *Magna Carta* of King John.[1]

Thousands of statutes have been passed, and these, with some older laws made by the King and his Council, unless repealed, together constitute the *Lex Scripta.*

All the statutes passed in one session of Parliament are divided into chapters, and are always cited by the year of the Sovereign's reign in which they are passed, and the chapter. Thus 30 & 31 Vic. chap. 20 means this Act was passed in the session of Parliament of the 30th and 31st year of Queen Victoria's reign, and that there were 19 Acts in that session passed before it. How Acts of Parliament are cited.

An Act of Parliament comes into operation when it has received the Royal assent, unless the Act itself fixes some other time. When an Act comes into operation.

[1] If indeed it can properly be called an Act of Parliament.

Public, or local and personal Acts.

Statutes are either public, or local and personal. Public statutes have general application. Local statutes affect particular places, and personal statutes particular persons. It is still possible to have a private Act of Parliament affecting one or more persons.

Formerly the judges were only supposed to know and take official notice of the public Acts. Every statute made since 1850 is to be considered as public, for the purpose of having judicial notice taken of it.

The Common law.

(2) *The Common law.*—The Common law is the unwritten law of England. It originally consisted of a collection of unwritten maxims and customs, which were supposed to have existed immemorially in this country. Many, indeed most of them, have been recognized by the Courts, and appear in judicial reports, but they are still called the Common law, or *leges non-scriptæ* " because they were never written as Acts of Parliament are, but derive their force from ancient immemorial usage, handed down by tradition." Though some of these customs and maxims are perhaps as old as the early Britons, the Romans, Saxons, Danes and Normans certainly introduced and incorporated many of their own maxims and customs.

Old customs of England.

Old codes of English Common law.

These old customs were collected in writing by various of the Danish and Saxon kings as Ethelbert, Alfred and Cnut, either as the laws of a part, or later, the whole of the kingdom. The laws of Edward the Confessor, so often in early times called the old laws of England, were not compiled until after the Norman Conquest. Cnut is said to have been the last great legislator of the Anglo-Saxon kings.

Still those codes (" dooms ") are classed under the heading of *leges non-scriptæ*, for the distinction is clear between collections of pre-existing customs and usages, and declarations of laws by a legislative authority, which are to be binding in the future whether they have existed in the past or not. Whether such collections as those of Ethelbert, Alfred and Cnut were confined to pre-existing customs or included some new legislation, they were promulgated as the existing law. After the Norman Conquest various attempts were made to formulate the old English law. We have no space to devote to the history of these attempts.

Common law now appears chiefly in decisions and statutes.

Nearly the whole of the Common law of England may now be said to be contained either in the decisions of the judges as to what such law was, or in various Acts of Parliament which have recognized and declared it.

Common law is composed of customs of different times.

When the judges of England began to declare what was the Common law of England, and when their decisions commenced to be published, this law was far from consisting of old British and Saxon maxims and customs. Many of the customs declared as part of the Common law were of Norman origin. Such was the system of the tenures of land in England, known as the feudal system of tenures, and many judicial forms and terms were of Norman extraction.

Has existed immemorially.

Still Blackstone states it as his opinion that "the ancient collection of unwritten maxims and customs called 'the Common law' however compounded, or from whatever fountains derived had subsisted immemorially in this kingdom, and had in great measure weathered the rude shock of the Norman Conquest."

Attachment of the English to the Common law.

The English nobles and people were always strongly attached to their old customs, *i.e.* to their Common law.

After the Norman Conquest the Common law was in great jeopardy.

Professor Holdsworth in his "History of English Law" says: "The reigns of the Norman kings were perhaps the most critical of all periods in the history of English law. It was then that it was settled that there should be a common law. It was then that some of its fundamental principles began to emerge."

Clergy did not like the Common law.

It is said that the foreign clergy who came to this country during the time of the Norman kings did not like or encourage the Common law, but preferred the more scientific system of the Civil law.[1]

Revival of Civil or Roman law.

In the twelfth century there was a great revival of the study of Roman or Civil law in Europe, which finally extended to England. The Archbishop of Canterbury about the year 1139 placed a man named Vacarius, who was very learned in the Civil law, in Oxford University for the express purpose of teaching Civil law. The clergy eagerly accepted his teaching, but the nobles and the people had the greatest dislike to it. Most of them

[1] "Civil law," see *ante* page 8.

probably knew little about the Civil law, but objected to it for the very English reason that it was foreign.

The English cling to their Common law.

They were always clamouring for the enforcement of the laws of Edward the Confessor, a very vague term, for it is more than doubtful whether there were any written laws of Edward the Confessor, but meaning to them the old Common law customs of England.

Study of foreign law is forbidden.

King Stephen issued a proclamation forbidding the study of foreign law in England. This was aimed against the study of the Civil law. The nobility from time to time declared that they would not change the old law of England, and that England should not be governed by the Civil law.

The Civil law accordingly was never accepted as such in the Common law courts, though some of the customs introduced by the Normans may have been founded on principles of Roman law.

Rise of the Inns of Court.

Some historians say it was on this account that the clergy, who for long after the Norman Conquest were both judges and advocates, gradually withdrew themselves from the Common law courts and left the study of Common law to laymen. This, and the fixing by Magna Charta of the Court of Common Pleas at Westminster, is said to have been the origin of the establishment of those great and ancient schools of law known as the "Inns of Court" (see *post* p. 55).

Particular customs.

The old customs of England, which are the foundation of the Common law, may be either (*a*) General, *i.e.* customs which apply to the whole kingdom, or (*b*) Particular, *i.e.* customs affecting only the inhabitants of particular districts.

Of general customs, the practice and customs of merchants are an important branch. Particular customs are very numerous. Two good illustrations will suffice: (1) the custom of *Gavelkind* in Kent, by which, if a man leaves no will, his lands in Kent descend, not to his eldest son, but to all his sons alike; (2) the custom of *Borough English*, in some old English boroughs, where the land, in the absence of a will, descends to the *youngest* son, to the exclusion of all his elder brothers.

What is a valid custom?

A custom, whether general or particular, must have been in existence so long that "the memory of man runneth not to the contrary." Such is the quaint old

phrase, which means that the custom must be immemorial. Legal memory is supposed to date back to the beginning of the reign of Richard the First (1189). Proof of observance of a custom for a long time is *prima facie* proof that it always existed, but if its beginning can be proved it is void as a custom.

A custom, to be part of the Common law, must also be reasonable, certain, and have been continuously and peaceably enjoyed, and must not be inconsistent, at any rate in the same locality, with another custom existing there.

Whether a custom, general or particular, is a part of the Common law of England, can only be finally declared by the judges, whose decisions when pronounced are afterwards binding upon themselves and all inferior courts. These decisions are preserved among the public records and set out in the various law reports which have existed, with some intervals, from the reign of Edward II.

Third branch of the *lex non-scripta*.

Blackstone gives as a third branch of the unwritten law (*lex non-scripta*) what he calls "the peculiar laws which by custom are adopted and used only in certain peculiar courts and jurisdictions." By this description he refers to the Civil law, and the Canon law.

The Civil law has already been explained (*ante* p. 8).

Canon Law

Canon law.

A few words on what is called the "Canon law" are necessary, though little more can be done than explain the meaning of the term.

The Canon law is the ecclesiastical law, or the law of the Church, which relates to matters over which the Church assumes, or formerly assumed, jurisdiction.

"Before the Reformation the whole of western Europe was, in Church matters, subject to the jurisdiction of one tribunal of last resort, the Roman Curia" *i.e.* the Pope's Court (Pollock and Maitland).

Canon law is deemed unwritten law.

The Canon law, like the Civil law, though called part of the unwritten law, is really in writing, but it is not on that account that it has any authority in this kingdom. It can only be said to be part of the common unwritten

law when it can be proved that it has been accepted in particular courts, and in particular cases from time immemorial.

Roman Canon law.

It is called sometimes the body of the Roman Canon law, for it emanated substantially from Rome.

The relation between the Canon and the Civil law was at one time very close. The Canon law had borrowed its form, its language, its spirit, and many a maxim from the Civil law." [1]

Canon law is composed of the decrees of the general councils of the Roman Church and the "Constitutions," *i.e.* declarations of the law of the Church by the various Popes of Rome.

These were all collected together in 1140 by a monk named Gratian, who published them in three books. These books are known as the "Decretum Gratiani," or simply as the "Decretum." Gregory the Ninth carried the Papal Constitutions up to 1234, and published them in five books under the name "Decretalia Gregorii Noni." A sixth book, generally known as the "Sext" was added by Pope Boniface the Eighth in 1298.

Another body of decretals, known as the "Clementines" (they had proceeded from Pope Clement the Fifth) was promulgated in 1317. In 1500 the Canon law was completed by the publication of another collection of Constitutions, known by the name of the "Extravagants." [2] Some decrees of the later popes, called "Extravagantes Communes" have since been published in five books.

Components of the Canon law.

It must therefore be remembered that the "Decretum," the "Decretalia Gregorii Noni," the "Sext," the "Clementines" and the "Extravagantes" form what is called the "Canon law," or the "Canon law of the universal Church."

There was also, according to Blackstone, a sort of national Canon law in this country, composed of *legatine* and *provincial* Constitutions. The *legatine* Constitutions were enacted in national synods held under papal legates. The *provincial* Constitutions were chiefly the decrees of provincial synods held under various Archbishops. These purely separate Church rules had, in

[1] Pollock and Maitland's "History of English Law."

[2] *Decretales extravagantes* means decrees, *quæ vagabantur extra decretum*, *i.e.* the "Decretum Gratiani."

the view of the Canonist, scarcely any more authority than local customs.

Roman Canon law still exists in England.

Just before the Reformation, in 1534 an Act of Parliament provided that a review should be had of the Canon law, and until such review, all canons, constitutions, ordinances, and synodals provincial, which were not repugnant to the laws and customs of the realm or the King's prerogative, should still be used and executed. No such review has been perfected, so, subject to this restriction, the old Canon law remains.

The Ecclesiastical law above alluded to was never binding on the Common law courts in England, whether it was binding on the Ecclesiastical courts or not, is a question much disputed.

The courts which administer Canon law will be alluded to later (see p. 42), but in England, since the Reformation, the King's Courts control in a very real manner the Ecclesiastical courts, and there is an appeal from them, in the last resort, to the Judicial Committee of the Privy Council.

Equity

Equity.

Before leaving the unwritten law of England, reference must be shortly made to another branch of unwritten law, which long occupied a peculiar position, and existed side by side with the Common law. This branch of the unwritten law is called "Equity."

What is Equity?

Equity means fairness or right, and principles of Equity were principles of justice administered usually by the Chancellor, first as a member of the King's Council, and afterwards as an independent judge, to correct or supplement the Common law.

Why was Equity required?

The rules of the Common law were too rigid. It took no account of certain subjects which law should provide for, and its rules and maxims were applied in so strict a fashion as in many cases to cause injustice.

Old system of original writs.

According to Common law every kind of civil wrong was supposed to fall under some particular class, and for each class an appropriate writ existed, or was supposed to exist. A writ is the first step in an action.

System caused injustice.

If, as often happened, a man applied for the wrong writ, he lost the action. For some wrongs no writ existed.

Writs were issued in Chancery by the clerks. Even when they had power to frame a special writ suited to the particular case, they often did not do so.

Remedy for injustice.

When there was no writ or the strict interpretation of the Common law rules worked injustice, the injured person had no other option than to petition the King in Parliament, or the King in Council, who referred such things to his Chancellor as "Keeper of the King's conscience."

The Chancellor.

"Thence grew up a practice of applying to the Chancellor direct, who would take upon himself to remedy the wrong, by ordering the defendant to do, and compelling him to do, what he (the Chancellor) considered to be right." (Hayne's "Equity.").

Disobedience to the Chancellor's orders and decrees was a special contempt of the King's authority, and punishable as such.

Chancellor was not originally a judge.

The Lord Chancellor was not originally a judge. He was the King's Principal Chaplain, and the head of the writ-office or Chancery, out of which writs were issued.

He came to be recognized as such.

In course of time the Chancellor came to be recognized as a judge, who, with his assistants, administered justice on equitable principles, which were often quite contrary to the principles of the Common law.

It is difficult to explain shortly the various reasons why these different systems of law and equity existed side by side.

Equity courts became governed by rules.

Although at first the Chancellor dealt with every case of hardship separately and on its merits, after a time he and the other Equity judges laid down rules by which they would be guided in other like cases. Equity finally became as much a science governed by fixed principles and precedents as was the science of the Common law.

Why two systems of justice, administered by separate and sometimes antagonistic courts, should have been allowed to exist for so many hundred years side by side is one of the great peculiarities of the history and development of English law.

Difference between Law and Equity.

It was Lord St Leonards, a great judge, who once wrote these words: "It must sound oddly to a foreigner that on one side of Westminster Hall a man shall recover an estate without argument on account of the clearness of his title to it, and that on the other side of the Hall

his adversary shall, with equal facility, recover back the estate." Not only "a foreigner" but an English schoolboy will probably think this odd.

One would have thought that when the Common law was insufficient or worked hardships it would have been amended, but with the rigid conservatism of the English character the Common law principles were reverently, almost religiously cherished, and a new and independent system of justice was allowed to arise, and in some cases almost to supersede the Common law.

Necessity for Equity.

Of the absolute necessity of the Courts of Equity there can be no doubt. Two illustrations ought to make this clear to any schoolboy.

Trusts.

First.—The Common law regarded the legal owner of land as the absolute owner. Therefore, though land had been conveyed to a man as a trustee for the benefit of other people—to the use of other people as it was called—the Common law could not make him carry out his trust. Land was often given in trust, though the good faith of the trustee was the only thing relied upon. One of the reasons was that land could not be left by will. Equity interposed and, in effect, said to the trustee: "Though the land is legally yours, we will make you use it for the benefit of those for whom it was intended."

Mortgages.

Secondly.—Everyone knows a mortgage of land is only a security for money borrowed upon it; the borrower is called the mortgagor, the lender the mortgagee. But the land is conveyed, even to this day, to the mortgagee, that is, to the person who lends the money, and a day is named for repayment of the money. Not one mortgage in probably a thousand is paid off on the day named in the deed, or indeed intended to be so paid. In all such cases the right to get the land back was gone. The law would not, indeed could not, help the unfortunate mortgagor. But again Equity interposed and insisted on the real intention of the parties being adhered to. In the view of Equity the land was only conveyed, and only meant to be conveyed, to the mortgagee as security for the debt. The maxim was "once a mortgage always a mortgage," consequently though the time for payment is past, the mortgagee if and

Mortgager's "equity of redemption."

when he is paid must re-convey the land. If the mortgagee has taken possession of the mortgaged land he can only repay himself. After he had mortgaged, the mortgagor had no right in the land at law. In Equity he always had his equity of redemption which these courts treat as a right in the land, capable of being sold or mortgaged again, or left by will. The Court of Equity alone can fix a time within which the mortgage must be paid off. If this is not done within the time allowed by the Court, the mortgagor loses his property, or in other words, loses his equity of redemption. Even where application is made to the Court to foreclose, as it is called, the mortgage, the mortgagor can always have the property sold if it is likely to realize more than the mortgage money.

Further advantages of Equity.

Further, one of the essential differences between law and equity was that equity would give you the thing itself for which you had bargained, whereas law would only give you a pecuniary compensation for the dishonesty of the other party in not fulfilling his contract.

Thus, if A bought a horse of B, and B refused to let him have it, the courts of law could generally only make B pay damages. But a Court of Equity would order B to carry out his contract specifically by making him deliver the horse. Again, if A apprehended on good grounds that B was *going* to build a house so near to his as to seriously interfere with his right to light, the courts of Common law could not prevent B doing this, but only award A damages *when the injury had been done*. The Courts of Equity said, "We can, and will in a proper place prevent B from building in such a way as to interfere with A's right to light."

These are only illustrations of the many useful jurisdictions acquired or assumed by the Courts of Equity.

Equity courts attract much business.

It will not surprise anyone to hear that business rapidly increased in these Equity or Chancery courts. The Lord Chancellor, even with the help of the Master of the Rolls, another great Chancery judge, and later, some other judges, called Vice-Chancellors, could not keep pace with it, and in the early part of the last century serious delays and abuses existed in those courts.

Every boy and girl has heard of the delays of Chancery. Charles Dickens presented a vivid picture of it—with perhaps not more latitude than is permissible to the novelist—in his book called " Bleak House."

Delays of Chancery courts.

All this is now changed. There are no arrears in the present courts of Chancery, and much less expense involved.

At length in the years 1873 and 1875 were passed the great Judicature Acts—the Supreme Court of Judicature Acts—by which the two systems of Law and Equity as administered on different principles came to an end. The Supreme Court of Judicature was established for the Common law and Chancery courts, and it was declared, for once and all, that in all matters in which there was any conflict or variance between the rules of Equity and the rules of Common law, the rules of Equity should prevail.

Amalgamation of Law and Equity.

Principles of Equity to prevail.

Though the Chancery courts still remain, and retain the jurisdiction which they had gradually acquired before the year 1873, the Common law courts must now administer the law in accordance with the principles of Equity.

Common law courts now administer equitable principles.

So much for the written and Common law of England.

We purpose to deal next with the courts which administer the law in England.

CHAPTER III

THE COURTS WHICH ADMINISTER THE LAW IN ENGLAND

"The place of justice is a hallowed place." LORD BACON

Courts of Justice.

THE Courts of Justice in England all derive their power from the Crown, and in contemplation of law the King is always present in his courts, being represented by his judges.

"For the more speedy, universal and impartial administration of justice between subject and subject, the law hath appointed a variety of courts, some with a limited, others with a more extensive jurisdiction; some constituted to enquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review" (Blackstone).

What is a "Court of Record?"

Most of the higher courts are called *Courts of Record*. This means that a *record* is kept of all their proceedings as a perpetual memorial and evidence of what has taken place in them. Courts of Record alone have power to fine or imprison for contempt of the court.

History of courts cannot be dealt with.

The origin and development of the courts which to-day administer the law in England is a subject of entrancing interest, but it is unfortunately a subject of enormous size and with numerous ramifications.

In an elementary book, such as the present, it is impossible to deal with the history of these courts, even cursorily. This will not be attempted except on such occasions as it becomes absolutely necessary for the purpose of making clear some questions as to their present position, or jurisdiction.

Design of this chapter.

The object of this chapter is to describe the principal courts existing in England to-day, and to give a short account of the jurisdiction and powers possessed by these courts. They are set out by name in the following list, somewhat in the order of their importance, but the list is not complete. There are a number of small courts

with local jurisdiction of various kinds which it would take too long to enumerate, and the names of which could serve no useful purpose.

List of English Courts of Justice.

The chief English courts are :

A. The House of Lords.
B. The Judicial Committee of the Privy Council.
C. The Court of Appeal.
D. The High Court of Justice,
  (1) Chancery Division.
  (2) King's Bench Division.
  (3) Probate, Divorce, and Admiralty Division.
E. The Courts of Assize.
F. The Central Criminal Court of London.
G. The Palatine Courts.
H. The County Courts.
J. The Magistrates' Courts,
  (*a*) The Quarter Sessions (1) In Counties; (2) In Towns.
  (*b*) Petty Sessions.
  (*c*) Stipendiary Magistrates.
K. The Sheriff's Court.
L. The Coroner's Court.
M. The Spiritual or Ecclesiastical Courts.

Each of these Courts is now dealt with in order.

A. The House of Lords

The House of Lords.

The House of Lords is the highest court of appeal in the realm. It hears and decides finally appeals brought from any order or judgment of the Court of Appeal in England. It also hears appeals from the Supreme Courts of Scotland and Ireland, but this jurisdiction we do not deal with.

No original jurisdiction in actions.

It has no original jurisdiction in civil cases, *i.e.* cases concerning the private rights of individuals, though it once claimed, and possibly possessed this authority. In 1668 such a claim led to a violent dispute with the House of Commons (Skinner's case). It does not now exercise any original jurisdiction or interfere in the course of proceedings in lower courts. In its capacity as Supreme Court of Appeal in civil cases in England, it hears appeals only, and these must first, in England, have been heard and decided by the Court of Appeal, whether they are Common law or Chancery cases.

In olden times Parliament was the supreme tribunal to which appeals could be taken, and after a time the term "Parliament," when applied to appeals from the Common law courts came to mean the House of Lords. In Henry IV's reign it was declared that judgments in Parliament belonged only to the King and to the *lords*, and not to the commons.

It was not until the reign of James I. that the House of Lords tried appeals from the Court of Chancery.

Their judgments bind themselves and all other courts.

The judgments of the House of Lords bind themselves and all inferior courts, *i.e.* if the Lords have decided what the law is, they cannot afterwards in a subsequent case alter it, and all inferior courts must administer the law as declared by the House of Lords.

All lords do not sit to hear appeals.

The question will naturally be asked, how can an assemblage of bishops and peers, many hundreds in number, most of whom are not lawyers, decide what is the law of England? The answer is they do not. Although in theory the judgment is the judgment of the whole House, only the professional lawyers in fact sit to hear appeals.

This has only been the rule recently. In 1834 the House decided a case without the presence of any professional lawyer, but in 1844 the rule was laid down that only the law lords should vote upon appeals.

What lords hear appeals.

The law lords are the Lord Chancellor, who presides, certain lawyers or judges of great eminence called Lords of Appeal in Ordinary[1] (first appointed by the Appellate Jurisdiction Act, 1876) and such peers of Parliament as hold or have held high judicial office.

Note.

"High Judicial office" means any of the following offices—the Lord Chancellor of Great Britain or Ireland, any paid judge of the Judicial Committee of the Privy Council, or any judge of one of the Supreme Courts of Great Britain and Ireland.

Intention existed in 1873 to abolish House of Lords as Supreme Court.

At the time the Judicature Act, 1873, was introduced, it was the intention to abolish the House of Lords as a Supreme Court of Appeal, but the opposition to this was strong, and it has survived, with very beneficent results.

[1] These Lords of Appeal are only peers for life. There was a great outcry in 1856, when the Government wished to create for the first time a life peer. The House of Lords at this time decided that it could not be done.

Criminal Jurisdiction of the House of Lords

The House tries peers.

The House of Lords itself tries any peer charged with treason or felony. Magna Charta declared that "a man was to be judged by his peers."[1] The rule that a peer is to be tried by the House of Lords is perhaps the last survival of this clause of Magna Charta.

It can imprison for contempt.

It can fine or imprison anyone guilty of contempt of the House.

Appeal in criminal cases.

Startling as it may sound, it is the fact that only since 1907 has any appeal been permitted in criminal cases (see *post* p. 184). Such an appeal is now allowed, and, in very special cases, may even be brought for decision to the House of Lords.

B. The Judicial Committee of the Privy Council

Judicial Committee.

The Judicial Committee of the Privy Council is a part of the Privy Council, originally the Great Council of the King.

Its jurisdiction.

No court is more important than this, for beside some original jurisdiction, it hears appeals from the chief courts of all our colonies and dependencies, and from English possessions outside the jurisdiction of the English courts, such as the Channel Islands and the Isle of Man.[2] Thus appeals from the Supreme Courts of India, Canada, Australia, and our other dependencies are, when allowed, brought to England, and heard by the Judicial Committee of the Privy Council.

Leave to appeal required.

It is necessary to use the words "when allowed." There is no appeal to England as of right, but the subject can always petition the Crown for leave to appeal. This is the course adopted by anyone who wishes to appeal from the courts of the English dominions outside England. The petition is first heard by the Judicial Committee itself, which either grants or refuses leave to appeal. It is the practice to grant leave in a civil case only when the case is of gravity as either affecting public interest, or relating to an important question of law, or to considerable property, or for other like reasons.

Practice as to granting leave.

[1] This right does not extend to the Bishops, who sit as Lords Spiritual in the House of Lords.

[2] Appeals from the Channel Islands were the first instances of this branch of the Council's jurisdiction.

In criminal cases, which have been heard in the properly constituted criminal courts of the colonies and dependencies, it is very difficult to obtain leave to appeal. The rule is that no review or interference with the course of criminal proceedings is allowed, unless it is shown that by the violation of the principles of natural justice, or otherwise, some substantial and grave injustice has been done.

Special rules of procedure.

The procedure of the Judicial Committee differs from that of the House of Lords (though many of the same law lords sit sometimes in one of these courts and sometimes in the other) in several respects.

As before stated (*ante* p. 24) the House of Lords is bound by its own decisions. The Judicial Committee is not. Again, in the House of Lords the judges who may dissent from the majority give the reasons for their dissent. In the Judicial Committee only one judgment is delivered, and that is the judgment of the majority. No dissentient opinions are expressed.

This system is thought to give greater weight to the decisions in the colonies or dependencies from which the appeals come.

Who are the judges ?

It is right that everyone should know who are the judges of this great court which settles the law finally in so many parts of the world.

It is not necessary to go back further than 1833.

The judges.

The Judicial Committee Act, 1833, makes provision for the Judicial Committee to consist of all members of the Privy Council holding, or having held, the office of Lord President, or Lord Chancellor, or any of the high judicial offices mentioned in the Act. These high judicial officers, as extended by later Acts, include many, indeed most, of the highest judges in England, Scotland, and Ireland who are Privy Councillors.

The King has also power to appoint two other Privy Councillors. But in addition to these British and Irish judges who sit, or are eligible to sit, the chief justices and judges of the Supreme Courts of all the more important British colonies and possessions, if they are Privy Councillors, have from time to time been either appointed to the Judicial Committee or made eligible to sit if called upon. The Archbishops and Bishops, if Privy Councillors, were formerly members of the Judicial Committee

in ecclesiastical cases, but have ceased to be members since 1876, though they may be called in as assessors. Three members form a quorum for the transaction of the business.

Other jurisdiction of Judicial Committee of the Privy Council.

The Judicial Committee has other jurisdiction which can only be mentioned.

It is the final Court of Appeal in many ecclesiastical causes.

It is the Court of Final Appeal from Prize Courts. By various statutes it has other duties of a quasi-judicial kind, and the Crown may specially refer matters to it.

C. The Court of Appeal

Created by the Judicature Acts.

This court was the creation of the Supreme Court of Judicature Acts, 1873 and 1875.

These were the Great Statutes which from the first of November 1875 united the principal courts of law and equity into one Supreme Court, with two permanent divisions, named respectively, "Her Majesty's High Court of Justice" and "Her Majesty's Court of Appeal."[1]

Note.

Former Courts of Appeal.

Before this Act was passed the Common law courts (see *post* p. 29), the Chancery courts, and many of the other chief courts of the country had different courts to which appeals were taken.

Thus Chancery and Bankruptcy appeals were heard by Lords Justices in Chancery, generally presided over by the Master of the Rolls. Appeals from any of the three Common law courts—viz. the King's Bench, Common Pleas, and Exchequer—were heard by the judges of the other two courts. This Court of Appeal was called the Exchequer Chamber. Admiralty appeals were heard by the Judicial Committee of the Privy Council, and so in other cases.

Present jurisdiction.

Since the Judicature Acts came into force the Court of Appeal hears all the appeals from the High Court of Justice, no matter which division they come from,[2] whether the King's Bench Division, the Chancery Division, or the Probate, Divorce, and Admiralty Division (see *post* p. 30).

[1] Now "His Majesty's."

[2] One or two exceptions, such as appeals from Prize Courts to the Judicial Committee, need not be noticed.

Generally appeal as of right.

In most cases there is an appeal from the decision of the High Court of Justice, and from the judges of the High Court when they try actions, to the Court of Appeal, as of right. In some cases, however, the High Court of Justice is the final court of appeal. This is the case generally in certain criminal matters over which the King's Bench Division has jurisdiction, and in appeals from inferior courts.

Some appeals direct from inferior courts to Court of Appeal.

In some instances, *ex gr.*, cases tried in the County Courts under the Workmen's Compensation Act, the appeal goes direct to the Court of Appeal.

The judges.

The judges of the Court of Appeal are the Lord Chancellor, ex-Lord Chancellors, certain of the Lords of Appeal who sit in the House of Lords, the Lord Chief Justice of England, the Master of the Rolls, who generally presides, and five other judges styled "Lords Justices."

Qualification of.

No one can be appointed a Lord Justice unless he has been a judge of the High Court for at least one year, or is a barrister of fifteen years' standing. They are all Privy Councillors.

As before stated, anyone dissatisfied with the decision of the Court of Appeal can take his case, *as of right*, unless prevented by statute, on appeal to the House of Lords.

D. The High Court of Justice

High Court of Justice.

This court, like the Court of Appeal, was the creation of the Judicature Acts, 1873 and 1875.

As its name shows, it is the High Court of Justice of England, and has had conferred upon it practically all the jurisdiction formerly possessed by the superior courts of this country.

Its divisions.

Though one court, it was at first for convenience divided into five divisions. Since the year 1881 it consists of three divisions:

1. The Chancery Division.
2. The King's Bench Division.
3. The Probate, Divorce, and Admiralty Division.

Only one court.

It is necessary to remember that the three divisions of the High Court of Justice constitute one court only. All the judges are judges of the High Court whether they sit in the Chancery, the King's Bench, or the Probate Division.

The work is to be divided between them by Rules of Court, but certain branches of the law were assigned to each division.

(1) *The Chancery Division*

Chancery Division.

In practice the judges who understand Chancery try most of the cases formerly heard by the Courts of Equity ("Equity," see *ante* p. 17).

Matters heard by Chancery Division.

It is not necessary to set out what matters are assigned to the Chancery Division of the Court. It is sufficient to remember that the Chancery Division deals with Trusts, Mortgages, Specific performance (see *ante* p. 19), the Guardianship of Infants, etc.

(2) *The King's Bench Division*

King's Bench Division.

The judges of the King's Bench Division, of which the Lord Chief Justice of England is President, now hear all the cases and matters formerly dealt with by the three superior courts of Common law.

These courts were for many centuries known by the names of the "Court of King's Bench," the "Court of Common Pleas," and the "Court of Exchequer." These historic names have disappeared since the year 1881.

Note.

The former Courts.

The Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer, till the Judicature Act was passed, each had its separate chief or head called respectively the Lord Chief Justice of the King's Bench, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. Many persons thought that a great historic link had been broken when these old names were extinguished.

All these courts were off-shoots of the old *Curia Regis*, the great court of the Norman kings, which originally followed the King wherever he went, till Magna Charta enacted that "the Court of Common Pleas should not follow the King but be held in some fixed place." This place was afterwards Westminster, where later still all the Common law courts sat.

In early times the Court of Common Pleas alone tried actions between private persons. The King's Bench had some appellate jurisdiction and extensive

criminal jurisdiction, and by its writs kept all inferior jurisdictions within their bounds. The Court of Exchequer at first dealt with the King's revenue, and really collected the taxes.[1]

For many hundreds of years all these courts had tried disputes between private individuals.

The legal fictions by which the Court of King's Bench and the Court of Exchequer got this jurisdiction are both interesting and amusing, but cannot here be dealt with. They can be found in Holdsworth's "History of English Law."

Sittings of King's Bench Division.

The judges of the King's Bench Division now sit either *in banc* as it is called, *i.e.* in Divisional Courts consisting of two or more of the judges, or alone, to try actions with or without juries.

When sitting *in banc* they hear appeals from inferior courts and other matters.

Qualification of judges.

Every judge appointed to the High Court of Justice must be a barrister of at least ten years' standing. In court they are addressed as "My Lord." Out of court as "Mr Justice ——," or simply "Judge."

3. *Probate, Divorce, and Admiralty Division*

The Probate, Divorce, and Admiralty Division.

The third division of the High Court of Justice is the Probate, Divorce, and Admiralty Division.

Two judges generally sit in this division, one of them bearing the title of "President" of the division.

It seems a strange thing at first sight, to unite in one division such different matters as Probate (the proving of wills, etc.), Divorce (the dissolution of marriages, etc.), and Admiralty (cases as to ships, etc.).

Why grouped together.

The reason is that, in old times all these parts of the law were administered by certain Doctors of Civil Law, who exercised this jurisdiction at a place called Doctors' Commons in London, and who in 1768 got a Royal Charter incorporating them as "the College of Doctors practising in the Ecclesiastical and Admiralty Courts."

Probate and Divorce were essentially matters for the Ecclesiastical Courts.

Probate jurisdiction.

(*a*) *Probate.*—In this capacity the division has juris-

[1] Called "Exchequer" from the chequered cloth in squares, like a chess board, laid on the table in the court.

diction to grant probate of wills. Probate is a copy of the will under the seal of the Court which vests the personal estate in the executor or administrator (see *post* p. 109).

If the will is disputed the case is heard either with or without a jury by one of the judges.

Note.

The Ecclesiastical Courts formerly decided all disputes as to wills of *personal*[1] property, and had certain jurisdiction over executors and administrators. They also granted administration of the personal property when there was no will.

In 1857 a Court of Probate was established by Act of Parliament, and the Ecclesiastical Courts lost this jurisdiction. This is the jurisdiction in Probate, now belonging to the Probate, Divorce, and Admiralty Division.

(*b*) *Divorce.*—In 1857 a Divorce Court was established by Act of Parliament, with power to dissolve marriages for misconduct. Though limited divorce could be granted before this date by the Ecclesiastical Courts the only manner to annul a marriage which had once been a lawful marriage, was by a special Act of Parliament. Divorce Court of 1857.

It is the jurisdiction conferred by the above Act, together with all the jurisdiction over matrimonial causes formerly possessed by the Ecclesiastical Courts, which now belongs to the Probate, Divorce, and Admiralty Division. Jurisdiction.

Note.

The Ecclesiastical Courts from the twelfth century had jurisdiction in all matrimonial causes, including divorce, though they could not dissolve a marriage altogether, which had once been lawful (see *post* p. 42).

(*c*) *Admiralty.*—The judges of the division when trying Admiralty cases, try disputes as to damage to ships by collisions, cases as to salvage (*i.e.* saving of ships or cargo from loss or wreck), claims for towage of ships, damage to cargo, etc. Admiralty jurisdiction.

Note.

This is the jurisdiction formerly vested in the High Court of Admiralty. Many little seaport towns How jurisdiction arose.

[1] *i.e.* not of land.

possessed maritime courts, where a customary sort of law, supposed to be founded on the *law of nations*, was administered between the traders of the town and foreign merchants and seamen.

By the fifteenth century there had arisen in England a Court of Admiralty presided over by a Lord High Admiral, which assumed *inter alia* jurisdiction over the sea and in nautical matters.

It acquired extensive civil, and also criminal jurisdiction in respect of crime committed on the high seas.

Its criminal jurisdiction.

In time it lost its criminal jurisdiction, which now belongs to the Central Criminal Court (see *post* p. 34), and the Judges of Assize; nevertheless it retained, until merged in the High Court of Justice, very extensive jurisdiction in matters relating to ships and shipping.

After a time the sittings of the Court were held at Doctors' Commons, where the Doctors of Civil Law practised (see *ante* p. 30).

Such, shortly, were the courts with their respective jurisdictions and powers, which by the Judicature Act were all merged in the High Court of Justice.

It may just be mentioned that in addition to these courts the Common Pleas jurisdiction of the Palatine Courts of Lancaster and Durham was also transferred to the High Court of Justice (see title "Palatine Courts," *post* p. 34).

E. The Courts of Assize

The Assizes.

There is scarcely a schoolboy, who lives in or near a county town, but has at some time seen the Judges of Assize proceeding to the Assize Courts in a State carriage, accompanied by the High Sheriff, and escorted by javelin men, trumpeters, etc.

One of England's oldest institutions.

The Assizes are one of the oldest institutions in England and have existed since the reign of Henry II.

The courts created by Commissions of Assize are now parts of the High Court of Justice.

Visit every county.

Twice a year (in some cases oftener) the Judges of the High Court travel to every county in England, and, generally in the chief town in the county, hold the Assizes.

There they try all the serious crimes committed in the county, and the actions which have arisen in the county.

Though the Assizes are almost always held by the judges of the High Court, they derive their authority from Commissions from the King authorizing them to hold the Assize.

The Commissions under which the judges of Assize act.

The Commissions are called (*a*) "Commissions of Assize" (the word "assisa" means originally an assembly or court), (*b*) of "Oyer and Terminer" (to hear and determine), and (*c*) of "Gaol Delivery" (that is, to deliver the gaols of prisoners).[1]

Though a criminal case has been sent for trial to the Assizes the prisoner is not actually tried until an "indictment" has been found against him.

What is "an indictment?"

An indictment is a charge of the particular offence presented to the Grand Jury.[2]

"A true bill."

The Grand Jury only hears one or two of the witnesses for the prosecution. If they think a *prima facie* case has been made out they write on the back of the indictment the words, "*A true bill.*" On this the prisoner is tried by the judge and a common jury.

"Not a true bill."

If the Grand Jury thinks no *prima facie* case has been made out, that the common jury would be almost sure to find the prisoner not guilty, they write on the back of the indictment, "*Not a true bill.*" The prisoner is thus saved the ignominy of being tried in a public court, and is at once discharged.

Judges represent the King.

The judges, when holding the Assizes under the aforesaid Commissions, are the direct representatives of the King, and it is said entitled to precedence over any subject of the Crown.

Sitting at *nisi prius*.

When the judges are trying civil actions, *i.e.* disputes between persons as to property, etc., they are said to sit at *nisi prius*. This is a peculiar expression which, being translated, does not convey much meaning to the ordinary boy. It really means that the Sheriff was directed to summon the jurors to Westminster unless before (*nisi prius*) the justices of Assize came into the county.

[1] Even earlier than the judges of Assize, there existed "itinerant justices," who travelled and tried cases, and enquired into the general administration of the county. They died out in the reign of Edward III.

[2] Grand Juries have been in abeyance during the war, and still are so.

F. The Central Criminal Court

The Central Criminal Court, or "Old Bailey."

London is by charter a county by itself, and the Lord Mayor, the Recorder and Aldermen were entitled to be put upon all commissions of "Gaol Delivery" and "Oyer and Terminer" for the city.

The judges.

In 1834 the Central Criminal Court was established where the Criminal Assizes for London are held. The judges of the Central Criminal Court are: the Lord Chancellor and the High Court Judges, the Lord Mayor, the Aldermen, the Recorder, the Common Sergeant, and the judges of the City of London Court, or any two of them. The requiring two Commissioners to be present to constitute the court is unusual.

What the court tries.

In practice, the Lord Mayor and Aldermen are the ornamental members of the court, though one of them is generally present. This court tries a great part of the serious crime committed in London, the county of Middlesex and some parts of Essex, Kent and Surrey.

The court sits every month. Most of the cases are tried by the Recorder, the Common Sergeant, or the City Judges. In the course of each Session one of the High Court Judges comes down to try the most important cases such as murders or manslaughters.

Entirely a criminal court.

No civil cases are tried at the Central Criminal Court. It is entirely a criminal court.

G. The Palatine Courts

Palatine Counties.

There are certain counties in England called Palatine [1] Counties. They are Chester, Durham, and Lancaster. Chester and Durham are Palatine Counties by immemorial custom. Edward III created Lancaster a County Palatine. In a sense these were little kingdoms within the kingdom of England. The owner of a County Palatine had formerly a kind of limited sovereignty within his county. He enjoyed regal rights, *jura regalia*. The courts in the county were his courts. He appointed the judges and justices of the peace. He could pardon crime. All writs and indictments were made out in his name, instead of in the King's name.

Owners of the Palatine Counties.

The owners of these three Palatine Counties were: of

[1] From "Palatinus." This term implied something peculiarly royal.

Durham, the Bishop of Durham; of Chester, the Earl of Chester; and of Lancaster, the Duke of Lancaster. All offences instead of being described as "against the peace of our Lord the King," were described as against the peace of him that had the County Palatine.

"The power and authority," says Lord Coke, "of those that had Counties Palatine was king-like, for they might pardon treasons, murders, felonies, and outlawries thereupon. They might also make justices of Eyre, justices of Assize, of gaol delivery, and of the peace."

Possible origin.

Blackstone thinks that Chester and Durham were given all these great privileges "because they bordered on Scotland and Wales, which countries were generally enemies of England, and in order that the owners being encouraged by so large an authority might be the more watchful in their defence."

Be that as it may, they had their courts very much on the model of the King's Courts, both Common law and Chancery.

No longer owned by subjects of the Crown.

Courts mostly abolished.

None of these Counties Palatine now belong to any subject of the Crown. In fact they all belong to the Crown, but many of their courts existed until recently, and some exist even now. Chester ceased to have separate courts in 1830. The jurisdiction of the Courts of Common Pleas of both Durham and Lancaster was by the Judicature Act transferred to the High Court of Justice (see *ante* p. 28).

Chancery Courts yet remain.

This left only the Chancery Courts of Durham and Lancaster. These still exist. Therefore the Palatine Courts now are the Chancery Court of Lancaster, and the Chancery Court of Durham.

These two courts try the Chancery cases which arise in their counties. They are presided over by a Chancellor or Vice-Chancellor, and have their own law officers.

An appeal lies from these Chancery courts to the Court of Appeal, thence to the House of Lords.

H. The County Courts

The new County Courts.

The County Courts as they now exist are comparatively new courts, having been established in 1845. Their establishment was largely owing to the efforts of Lord Brougham.

With what object founded.

The primary object of these courts is to bring justice within the reach of everyone, and at small expense.

The ancient County Court.

Note.

Though the present County Courts only date from 1845, the County Court is really the oldest court of England, having been founded by Alfred the Great. It was the great Saxon court. Though the present courts are very differently constituted, and their procedure and jurisdiction quite unlike those of the Saxon court, that court was never abolished. The Act of 1845 speaks of the new courts as a *revival* of the ancient county court.

Jurisdiction of County Courts.

The County Court has jurisdiction in almost all civil or personal actions in which not more than £100 is involved.

The claims may arise either for breaches of contract, or in respect of torts (*i.e.* wrongs, see *post* p. 162).

No jurisdiction to try any crime.

The County Court has no jurisdiction to try crimes of any kind.

Actions they cannot try.

A few actions arising out of torts cannot be brought in the County Court. These are libel, slander, seduction and breach of promise of marriage.

All the courts have Equity jurisdiction up to £500, and some courts in the maritime districts have limited Admiralty jurisdiction. They all have jurisdiction in ejectment, and cases where title to land is in question up to £100.

Much new jurisdiction given to them.

During the last forty or fifty years a very large number of Acts of Parliament have conferred special jurisdiction on the County Courts; indeed it is not too much to say that nearly all the new legislation has given some fresh powers and duties to the County Courts.

Some of their jurisdiction.

They have been given all the Bankruptcy jurisdiction of their districts. Cases relating to pollution of rivers, agricultural holdings, charitable trusts, public companies, friendly societies, and very many other matters are often brought in these courts.

Perhaps the most important jurisdiction which they exercise is under the Employers' Liability Act of 1880 and the Workmen's Compensation Act 1906, which Acts, as is well known, give workmen a right to receive compensation when injured in the course of their employment.

More actions are now brought in the County Courts than in any other courts in England.

The judges are appointed by the Lord Chancellor,[1] one for each district. The whole of England and Wales is divided into districts, more or less co-extensive with the counties. The judge visits all the chief towns in his district, generally once a month, and tries the cases. In most cases if the claim exceeds £5 the parties can have a jury as well as the judge.

The judges of County Courts.

Every judge must be a barrister of at least seven years' standing. He is addressed as "Your Honour," or simply "Judge."

Qualification of judges.

He is assisted in each of his courts by a Registrar, who must be a solicitor of at least five years' standing, and a staff of bailiffs and clerks.

An appeal lies from the County Court to the King's Bench Division of the High Court, but only where the judge is said to have made a mistake in law. There is no appeal on fact. In workmen's compensation cases the appeal goes directly to the Court of Appeal.

J. The Magistrates' Courts

The boys in English public schools are, in later life, the class from which the unpaid magistrates are largely drawn. An enormous amount of good public work is, and has for hundreds of years, been done by the unpaid magistrates of England.

The unpaid magistrates.

"The whole Christian world hath not the like office as Justice of the Peace if duly executed."—Lord Coke.

In olden time justices were persons elected by the freeholders to keep the peace in the various counties, but since the time of Edward III they have been King's magistrates, and called "Justices of the Peace."

The early magistrates.

Note.

It is interesting to know that the early Commissions appointing a number of Justices of the Peace, mentioned some by name, who, the Commission said, had always to be present when any business was to be done. These justices were said to be "of the Quorum."

The "Quorum."

[1] The Chancellor of the Duchy of Lancaster still appoints for districts within the duchy.

The words used were "*Quorum* aliquem vestrum, A.B.C. unum esse volumus."

So when Shakespeare, in "the Merry Wives of Windsor," describes Shallow as being "Justice of the Peace and *Coram*" it is most probable he meant to say he was of the "*Quorum*," though it seems certain it is only for euphony that he is afterwards said to be "Custalorum," meaning *custos rotulorum*, or keeper of the roll of justices.

This custom of the Quorum has died out. Now all the justices named in the Commission can form courts.

The county justices are really unpaid judges. They were formerly the permanent rulers of the counties to which they were appointed, having not only the judicial work, but most of the administrative work now done by the County Councils.

Now no property qualification.

Until recently it was thought desirable that all county justices should be persons of position in the county, and landowners. Till 1906 the qualification for a county magistrate was the possession of £100 a year from land, or the occupation of a dwelling-house assessed at £100 a year. Now no property qualification is required.

So many new duties were placed upon justices by various Acts of Parliament that it was said that "not loads but stacks of statutes were put upon them."

Long ago lawyers abandoned all hope of describing the duties of a Justice of the Peace, but *inter alia* they have to preserve the peace, issue warrants for the apprehension of criminals, perform numerous duties under Acts of Parliament, sit in Quarter Sessions and Petty Sessions, attend the Assizes as grand jurymen, etc., etc.

County Magistrates are appointed by the Lord Chancellor, on the recommendation of the Lord Lieutenant of the County.

Are advised by their clerk.

As most magistrates are not lawyers—though many have taken great pains to acquaint themselves with their legal duties—they always have a clerk, who is a lawyer, to advise them.

Magistrates' Courts.

A short description must be given of :

(*a*) Quarter Sessions : 1. In Counties,
2. In Towns.

(*b*) Petty Sessions.

(*c*) Stipendiary Magistrates.

(*a*) 1. *Quarter Sessions.*—All the magistrates of the county meet four times a year, generally in the county town, for Quarter Sessions. They elect their own Chairman and Deputy-Chairman. Besides much county work, they try with juries cases which have been sent to them to be tried by the various magistrates in different parts of the county sitting in Petty Sessions. Quarter Sessions in counties.

They have extensive jurisdiction. They cannot try treasons, murders, and some other serious crimes, or cases where penal servitude for life may be given for the first offence—these go to the Assizes, but most crimes not of such serious nature are tried at Quarter Sessions. Jurisdiction at Quarter Sessions.

The cases are tried with juries. The Chairman presides and sums up the case to the jury, and sentences the prisoner if found guilty.

Appeals from decisions at Petty Sessions, where allowed, are tried by the justices sitting in Quarter Session. Appeals.

(*a*) 2. *Quarter Sessions in certain Towns.*—We have described Quarter Sessions in counties. Quarter Sessions in certain towns are different. They are presided over by Recorders. A Recorder is a barrister of at least five years' standing, appointed virtually by the Home Secretary to preside over the Quarter Sessions of a particular town. As, except in very large towns, he only sits about once a quarter, he is generally a practising barrister. Recorder: What is?

The Recorder is sole judge of the Court, though sometimes town or borough justices sit with him, but they have no power. The cases are tried with juries. Recorder sole judge.

But it is not all towns that have a separate Court of Quarter Sessions and a Recorder. Many towns got their separate Courts of Quarter Sessions by old charters. The matter is now regulated by an Act of Parliament called the Municipal Corporations Act, 1835, amended in 1882, which allowed certain towns to apply to the Crown for a separate Court of Quarter Sessions. Many towns like London, Manchester, Liverpool, Birmingham, Bristol, and indeed many much smaller towns, have separate Courts of Quarter Sessions. Separate Courts of Quarter Sessions.

(*b*) *Petty Sessions.*—The magistrates, whether appointed for the county or for towns, sit frequently in such towns or in local centres in the county to hear cases which arise within the district, and either to commit the Magistrates in Petty Sessions.

persons charged for trial to the Assizes or Quarter Sessions or, if the cases are trivial, to dispose of them themselves. They can fine and impose limited imprisonment. They generally are required to sit two or more together, and form a bench. This is called sitting in "Petty Sessions."

Paid magistrates.

(c) *Stipendiary Magistrates.*—Stipendiary magistrates are paid magistrates. The great number of small offences committed in large towns rendered the appointment of professional magistrates necessary.

London and many other large towns have stipendiary magistrates, who sit daily. They are all barristers of at least seven years' standing, and appointed virtually by the Home Secretary.

Position of paid magistrates.

Any stipendiary magistrate sitting by himself has the powers of two ordinary magistrates sitting in Petty Sessions.

They are not obliged to try all the offences committed in the towns in which they sit. Most of the towns have their own unpaid magistrates, who may and often do sit in Petty Sessions to relieve the Stipendiary of a part of the work.

K. The Sheriff's Court

The Sheriff.

The Sheriff is a very ancient, judicial officer. In Saxon times he presided over the County Court, and was, in fact, the ruler of the county.

Former duties.

"He was responsible for the revenue of the county, for its military force, its police, its gaols, its courts, and the due execution of the writs or other orders addressed to him by the *Curia Regis*. But these great powers have gradually been taken from him" (Holdsworth). Many of his former duties were taken over by the Justices of the Peace.

Prisoners when they are now sentenced are committed to the custody of the governors of the prisons, but even now, if a man is to be hanged, it is the Sheriff who is responsible for the carrying out of the sentence, and it is said if he cannot get an executioner he must hang the man himself.

As a judicial officer he is now little more than a servant

to the superior courts of law, enforcing their judgments and attending the judges when they hold the Assizes.

Sheriff's Court.

The Sheriff still holds a court for the assessment of damages. When an action is brought in the High Court claiming damages, *and the defendant puts in no defence*, the case is often sent to the Sheriff in order that he may, with the help of a jury, fix how much the defendant ought to pay. The Under-Sheriff presides at such an enquiry.

L. The Coroner's Court

Coroners.

Coroners have existed since about 1194. Their duties in early times were, with the Sheriff, to safeguard the interests of the Crown in the county to which they were appointed.

These were formerly elected by the freeholders of the county. Since 1888 by the County Councils.

It is a life office, though a Coroner may be removed from it for misconduct by the Lord Chancellor.

Coroner's Court.

Now a Coroner's main duty is to hold an enquiry when any person is killed, or dies suddenly, or dies in prison. Even if a person is executed in prison the Coroner must hold an enquiry to ascertain whether such person was duly sentenced, and whether the sentence has been properly carried out.

His court is a court of record (see *ante* p. 22).

He is assisted by a jury which must contain at least twelve men. Twelve must agree on the verdict.[1]

> "A dozen men sat on his corpse
> To find out how he died." Tom Hood.

The body must be found before a Coroner's inquest can be held upon it.

Effect of coroner's verdict.

By the verdict of the jury any person may have recorded against him a verdict of murder, or homicide, or of being an accessory to the crime of murder or homicide, but the Court cannot sentence, but only send the case for trial to the Assizes.

It is usual now to indict a person against whom such a verdict is found (see *ante* p. 33), but in such a case, even

[1] During the war a jury could be dispensed with.

if the Grand Jury finds "not a true bill," such person may still be tried on the verdict of the Coroner's jury.

"Treasure trove."

A Coroner may also have to enquire in his Court into what is called "treasure trove," *i.e.* treasure which is found; who the finders of the treasure were, and whether it has been concealed.

He no longer enquires into wrecks, or what fish are royal fish and belong to the King.

M. The Ecclesiastical Courts[1]

Ecclesiastical are Church Courts.

As before stated, the Ecclesiastical Courts are the Church or Spiritual Courts, in which Ecclesiastical or Canon law is administered (see *ante* p. 15).

Early jurisdiction.

In early times these courts made exclusive claim to decide and administer many matters in which not alone the clergy, but the interests of the clergy and the Church were concerned.

This naturally resulted, especially before the Reformation, in differences between the King's or lay courts, and the spiritual courts.

Claims of Church courts.

Not only did the Church courts claim sole jurisdiction in the control of Divine services, the government of Church property, and the discipline of the clergy, but they claimed to adjudicate on all questions of marriage, divorce, and the legitimacy of children; to decide all questions of wills of personal property, all cases in which any clerk (clergyman) was a party, whether such cases were criminal or civil, and cases which depended upon promises made on oath, called "pledges of faith," etc.

The judges in early times.

Formerly the judges of the spiritual courts were often the same persons as the judges of the lay courts, and were ecclesiastics.

"From the time of Henry II the lay courts became victorious in almost every struggle with the spiritual courts" (Holdsworth).

The King is head of Church courts.

After the Reformation was perfected, it is the King who is to be supreme over all courts spiritual as well as lay. Though as stated (see *ante* p. 17), the old Canon law, emanating from Rome, was still to be used in the spiritual

[1] Only the shortest mention of these courts can be given. Their respective jurisdiction is not within the scope of this book.

courts, " so far as it was not repugnant to the laws and customs of the realm, or the King's prerogative," it is to be called " the King's Ecclesiastical law of the Church of England." [1]

The King is supreme within his realm, and no outside interference is to be permitted. *His* courts, both spiritual and temporal, are to decide all cases which occur within the realm.

As emphasizing this it was decreed that no new Canon law should be made except in Convocations summoned in the King's name, and given power to make new Canon law.

Canon law discouraged, but the Church courts retained.

The teaching of Canon law was discouraged in the universities, and the teaching of Civil (Roman) law took its place.

The spiritual courts were maintained, and it became usual for those who had taken a degree in Civil law (*i.e.* D.C.L.) to practise the old Canon law in these courts, and, strangely enough, to combine it with their practice in the Court of Admiralty.

The Doctors of Civil law.

These men were associated as a distinct profession for the practice of the Civil and Canon laws. They bought a site in London, afterwards known as " Doctor's Commons," on which they erected houses, and buildings used for holding the Ecclesiastical and Admiralty Courts. They obtained in 1768 a Royal Charter incorporating them under the name and title of " the College of Doctors of Law exercent (practising) in the Ecclesiastical and Admiralty Courts."

Proctors.

They were called " Proctors."

Church courts lose a great part of their jurisdiction.

The full claims of the Church courts were never admitted by the State and lay courts. In course of time they lost nearly all the important jurisdiction they formerly had, or laid claim to.

All that is now left them is some jurisdiction, criminal or corrective, over the clergy, and some jurisdiction in purely Church matters, such as services of the Church, ordination, ritual, consecration, and some rights with regard to Church property.

Lost jurisdiction in matrimonial causes in 1857.

They lost all their jurisdiction over marriages and divorce in 1857, when the Divorce Court was established.

[1] It has often been declared, on authority, that the old Canon law was not foreign law, but a part of the Common law of England.

Lost jurisdiction over wills, etc., in 1857.

In the same year they were deprived of the last part of their jurisdiction over wills and testamentary dispositions of personal property by the establishment of the Court of Probate. This new court was to be presided over by a single judge, who was also to be the judge of the Court of Admiralty.

All this jurisdiction is now exercised as has been already said (*ante* p. 30) by the Probate, Divorce, and, Admiralty Division of the High Court of Justice.

Benefit of Clergy.

Benefit of clergy.

The expression "benefit of clergy" is one often met with in ordinary literature. It is necessary to explain what is meant. It originally meant that a clergyman charged with serious crimes, called felonies, could only be tried in the Church courts. In these times many felonies were punished by death or mutilation, but the Church courts could not, it was thought, shed blood. Consequently the clergymen escaped these serious punishments. Still he could be punished by the Church court by imprisonment, by degradation from his office, and, it is even said, by whipping.

For minor offences he could be tried and punished by the King's courts.

In later times benefit of clergy was claimed by peers, and by any person who could read. The effect was to relieve them of punishment for many crimes.

Now abolished.

This right of setting up the "benefit of clergy" as an answer to crime was gradually diminished, until in 1827 it was abolished altogether.

The Present Ecclesiastical Courts.

Ecclesiastical Courts.

Both the Archbishops and Bishops had their respective courts.

Court of Arches.

The Archbishop of Canterbury's principal court is called the Court of the "Official Principal," or more usually the "Court of Arches"[1] It heard appeals from the various Bishop's courts, and had some original jurisdiction.

[1] So called because the Court sat at the Church of St Mary-le-Bow, which was built on *arches*.

Then there was the "Court of Audience," where the Archbishop sat himself. This has long been obsolete. Court of Audience.

The Prerogative Court dealt with wills of personal property when the property existed in more than one diocese. As before stated, the Church courts do not now deal with wills. Prerogative Court.

The "Court of Peculiars," presided over by the Dean of Arches, for certain extra diocesan parishes in London. Court of Peculiars.

The Court of the Vicar General, in which the Bishops of the Province are confirmed. Court of the Vicar General.

The Archbishop of York had similar courts, though with different names.

The Courts of the Archbishops are, since 1874, united under one supreme judge who must be a barrister of ten years' standing, or a judge of the High Court.

He is called the "Dean of Arches."

Then there was a High Court of Appeal from the Archbishop's Court, called the "High Court of Delegates," consisting in later times of Commissioners especially nominated by the Crown to hear the appeal. High Court of Delegates.

This jurisdiction is now exercised by the Judicial Committee of the Privy Council (see *ante* p. 25).

In addition to the Courts of the Archbishops, the Bishop of each diocese has his own court, called the "Consistory Court." This is presided over by the Chancellor of the diocese, who is often a barrister. The Court of the Diocese.

The Bishop may hear the cases himself.

There were also a number of courts called "Peculiar Courts," which had jurisdiction over churches and parishes which were exempt from the jurisdiction of the diocese in which they were situated. Most of these courts, which at one time were very numerous, are now abolished. Peculiar Courts.

The procedure of the above-named courts was often slow and cumbrous. Church Discipline Acts were passed in 1842 and 1892 to deal with any clergymen accused of offences against the laws of the land or Ecclesiastical law, or concerning whom scandal or evil report exists, and providing also that on conviction for certain grave offences, he shall forthwith forfeit his preferment. Statutory Courts of the 19th Century.

The Public Worship Regulation Act, 1874, which pro-

vided for the appointment of a single judge for the Provincial Courts of the two Archbishops, gave the Church courts new powers and procedure for dealing with a clergyman who violates the ceremonial law of the Church in respect of the use or disuse of ornaments, or the conduct of services.

The above Acts sometimes provide special tribunals for the hearing of such cases.

CHAPTER IV

OF THE JUDICIAL OFFICERS, THE JURY, AND THE ADVOCATES

"Ad quæstionem juris respondeant judices, ad quæstionem facti respondeant juratores." LAW MAXIM.

Scope of this chapter.

THE Courts of law having been described in the last chapter, it is purposed in the present chapter to shortly deal with the duty, power, and position of those persons who administer, or aid in the administration of the law in the courts.

Those who administer the law.

These persons are the judges, the magistrates, the jury, and the advocates.

The judges have already been incidentally considered. Still it is convenient, even at the risk of some repetition, to enumerate them again somewhat in the order of their status in the judiciary of the country, in order to focus in the minds of readers not alone their titles, but the offices which they hold, and their duties.

The body of men called collectively "the jury," with their duties and powers, and to some extent their history, will next be considered, and, afterwards, those who help in the administration of justice by pleading in the courts, and who are called "advocates."

THE JUDGES

The Lord Chancellor.

The Lord Chancellor is at the head of the justiciary of England. He is the first lay subject in the realm, the Archbishop of Canterbury alone takes rank before him.

He presides over the House of Lords. He is the President of the Court of Appeal. Upon his recommendation the ordinary judges of the High Court are appointed. He himself appoints the County Court judges and the Justices of the Peace. He possesses very extensive Church and other patronage.

Control of wards in Chancery.

He exercises, with other Chancery judges, the powers of the court over wards in Chancery, their custody, estates, education and marriage, though he does *not*, as Mr W. S. Gilbert suggests in "Iolanthe":

> "Sit in Court all day
> Giving agreeable girls away."

Although the Chancellor is President of the House of Lords, it is not necessary that he should be a lord himself, though in the present day he always is.

He sits in the House of Lords on a seat which is known as "the Woolsack." The Woolsack, though in fact it is situated about the middle of the House of Lords, is supposed to be *outside* the House.

The Lord Chief Justice.

The Lord Chief Justice of England is the second judicial magnate of the realm. He is President of the King's Bench Division of the High Court of Justice, also an *ex-officio* judge of the Court of Appeal. He presides in the King's Bench Division and in the Court of Appeal in the absence of the Lord Chancellor.

His office in olden times when he presided over the King's Court—the *Curia Regis* in the time of Henry I, with the name of "Chief Justiciar"—was more important than that of the Lord Chancellor, but the Lord Chief Justice of the King's Bench—now Lord Chief Justice of England—is perhaps not the direct descendant of the Chief Justicier.

The Master of the Rolls.

The Master of the Rolls was a great Chancery judge originally appointed to assist the Chancellor in his Court of Chancery (see *ante* p. 20). He is now, though still Master of the Rolls, a judge of the Court of Appeal, and usually sits in this court, and, in the absence of the Lord Chancellor, or Lord Chief Justice, presides over the court.

He is called "Master of the Rolls" because he had, and still has, the chief custody and control of all the records, or rolls of the realm, *i.e.* all the old official documents such as Acts of Parliament, decisions of the courts, etc.

The Lords of Appeal.

The Lords of Appeal in Ordinary, as they are called, sit in the House of Lords as life peers, *i.e.* their titles do not descend to their sons. They were first appointed in 1876 for the purpose of strengthening the judicial power of the House of Lords.

They must not be confused with the Lords Justices (see *infra*).

The judges who sit in the Judicial Committee of the Privy Council to hear appeals from the principal courts of our colonies and overseas dominions, have already been sufficiently described (see *ante* p. 25). The judges of the Judicial Committee of the Privy Council.

The Lords Justices of Appeal are five in number. They are the ordinary judges of the Court of Appeal, and sit in the Court of Appeal with the Master of the Rolls. They generally sit in two divisions, one of which hears appeals from the King's Bench Division, the other appeals from the Chancery Division. They are all Privy Councillors, and addressed in court as " My Lord." The Lords Justices.

The High Court judges are the judges who sit in the High Court of Justice, whether in the King's Bench or Chancery Division. The High Court Judges.

They are presided over by the Lord Chief Justice of England.

It is the judges of the King's Bench Division who now generally travel round England twice or more a year and hold the Assizes (see *ante* p. 32).

They are addressed as " My Lord."

The judges of the Probate, Divorce, and Admiralty Division are two—the President of the Division (who is an *ex-officio* judge of the Court of Appeal) and one ordinary judge. They are both of them judges of the High Court of Justice, though they sit in their own Division, and try cases concerning wills, divorce, and ships. The Probate, etc., judges.

Note.

Every judge of the superior courts holds his office for life, and can only be removed therefrom by an address from both Houses of Parliament presented to the King praying that this be done.

There are only two judges left in the Palatine Courts (see *ante* p. 34). They are the Chancellor of the Palatine Court of Durham, and the Vice-Chancellor of the Palatine Court of Lancaster. These judges try Chancery cases which arise within their districts. Palatine judges.

The County Court judges preside over the County Courts situate in the various districts of England. They County Court judges.

are addressed as "Your Honour." Their duties have already been stated (see *ante* p. 35).

Magistrates.

The magistrates (unpaid) for the counties or towns try in Petty Sessions, without juries, small offences, and commit serious cases to the Quarter Sessions or Assizes. They sit themselves under a Chairman at Quarter Sessions for the counties, and try many important cases, but not the most serious, which are sent to the judges of Assize (see *ante* p. 39).

The Recorder, sitting with juries, tries cases at Quarter Sessions in boroughs and towns which have a separate court of Quarter Sessions (see *ante* p. 39).

Stipendiary.

The paid or Stipendiary Magistrates have been described (see *ante* p. 40).

The Sheriff and Coroner.

The Sheriff and Coroner in so far as they preside in their respective courts, have previously been sufficiently dealt with (see *ante* pp. 40-41).

Ecclesiastical judges.

The ecclesiastical judges are sometimes the Archbishops and Bishops themselves, sometimes the Chancellors of the diocese, and for the Archbishops' Courts, the Dean of Arches (see *ante* p. 42).

Special tribunals may be formed for criminal or moral offences or offences against the Church rubrics committed by clergymen under the Church Discipline Acts of 1842 and 1892, and the Public Worship Regulation Act of 1874 (see *ante* p. 45).

The supreme court of appeal from the Church courts is the Judicial Committee of the Privy Council (*ante* p. 45).

The Jury

The common jury.

The jury, or common jury as it is called, is composed of twelve jurymen, who sit with a judge and decide all questions of fact in dispute between the parties.

In County Courts.

In county courts the number of jurymen is only eight.

In criminal cases the jury decide whether the prisoner is guilty or innocent. Whether trying actions or criminals they *must* be unanimous in their opinion. If they cannot agree they are discharged, and another jury tries the case.

Jury only decides the facts.

They only decide *facts*. They have nothing to do with the law. They must accept the law from the judge.

Blackstone describes "the jury" as "the principal

criterion of truth in the law of England," but Blackstone was enamoured of the law of his day and thought it incapable of being improved upon. Juries, although in some classes of cases they may, and sometimes do, allow prejudice to influence sound judgment, are yet a very useful institution. In many business disputes they are of the greatest value.

How sworn

They are sworn in civil actions to "*give a verdict according to the evidence.*" In criminal cases (felonies) the words of the oath taken by each of them is in the following words :—

How sworn in a criminal case.

"*You shall well and truly try and a true deliverance make between our Sovereign Lord the King and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence, so help you God.*"

Formerly could not separate.

A jury trying a criminal case of high treason or any felony (see *post* p. 177) was not allowed to separate until they had given their verdict.

A living lawyer remembers on one occasion seeing a jury locked up for the night, but the prisoner let out on bail!

Since 1897 the judge may allow the jury to separate in all cases except treason, treason-felony and murder.

Must not separate after the judge sums up his case.

But if in a criminal case after the judge has summed up a juror separates himself from the others, and, not being under the control of an officer of the court, converses, or is even in a position to converse with other persons, the whole trial is bad, and must be had over again.

The usher in charge of a jury retiring to consider their verdict was sworn to keep them without meat, drink or fire.[1] Since 1870 these privations need not be insisted on.

History of the Jury

History of jury.

The writer cannot resist the temptation of departing so far from the scheme of his book as will allow him to tell, though at no great length, the history of the growth of trial by jury.

It is of Common law derivation, and though ancient,

[1] On one occasion a juryman called for a glass of water. The usher came to the judge and asked him if he might give the juryman water. "Well, let me see," said the judge, "it is not meat, and *I* should not call it drink; yes, you may."

is by no means the oldest method of trying offences and disputed rights.

Old methods of trial.

In the twelfth and thirteenth centuries modes of trial such as "compurgation," "ordeal," or "battle" existed.

Trial by compurgation.

In compurgation the complainant or plaintiff pledged his oath to the truth of his complaint, and was supported by a number of witnesses called a "secta." These persons, probably, knew nothing of the facts, but pledged their belief in the plaintiff and the honesty of his case. If the defendant or the accused could obtain a larger number of persons, generally twice as many, to support his denial with their oaths, he won the case, or was acquitted, as the case might be. These persons were called "compurgators." Trial by compurgation was not much used in criminal cases.

Trial by ordeal.

Trial by ordeal was based on the belief that God would always interpose to defend the right.

If an accused person could carry red-hot iron, or plunge his arm into boiling water, or sink right away when thrown, bound, into the water! he was assumed to have the right on his side.

Trial by battle.

Trial by battle, which came in with the Normans, was a mode of trial resting on the same belief that God defends the right. It was called "*judicium Dei.*"

An accused person could show his innocence, or establish his right to property, by challenging his opponent or even his opponent's witnesses, to defend their statements by the battle. He who was vanquished in the fight was declared to be in the wrong.

A woman, a child, or a person over sixty years of age, could decline battle, or could employ a champion to fight for them. Later even able-bodied persons could engage a champion. The Churches sometimes gave a general retainer to their champions, and it is said took good care to have strong ones.

Though trial by compurgators was in later times little used in practice, it was occasionally resorted to even in the last century.

Trial by ordeal was discontinued from the time of Henry III.

Trial by battle, though it became obsolete, was only finally abolished in 1819.

The early jury.

In the present day the jury is supposed to know nothing of the case they try until they hear the evidence of the witnesses in court. Indeed, if a juryman is thought to know any of the parties to an action, or to have discussed the case before coming into court, he would now be objected to as biassed. Just the reverse was the case when the jury was first introduced.

At first were really witnesses.

They were neighbours of the party or parties involved, and more like witnesses than judges of the evidence. They decided, not after hearing independent evidence, but on their own knowledge, or what they could find out from their own enquiries, and also on what they knew to be the character of the parties.

It was not till the middle of the seventeenth century that the witnesses and the jury were, and were regarded as, different classes of persons.

Trial by jury formerly rested on consent.

Trial by jury formerly rested upon the consent of the accused person to have his guilt or innocence tried in this way. This mode of trial was long unpopular. Probably it was thought cowardly, and that fighting was the more manly course.

If the prisoner pleaded "not guilty" this was called "throwing himself on his country," and gave the jury the right to try him.

If prisoner would not plead.

If he would not plead, he could be tortured, even pressed to death.

Now, if a prisoner will not plead, a plea of "not guilty" is always entered, and the trial proceeds. Such is the short history of trial by jury in England.

The grand jury.

The grand jury has already been alluded to. It presents, as it is called, prisoners for trial, by finding that the indictment against them is a "true Bill" or it can discharge them by finding "not a true Bill" (see (*ante* p. 33).

Special jury.

A party to a civil action, but not as a rule in a criminal case, may apply that the case, being of importance, shall be tried by a special jury, instead of a common jury.

A special jury is chosen from men of higher position, and presumably—though not always in fact—of superior education to the common jurymen.

Every special juryman is paid one guinea each case he

tries, as against the one shilling usually paid to the common juryman.

The Advocates

The advocates.

The advocates are those men [1] who appear before the judges and juries to advocate, or plead the cause of the parties by whom they are engaged. Such parties are called their "clients."

Barristers or solicitors.

Advocates are either barristers or solicitors.

No one else is allowed to plead in our courts, except that the parties to an action can, if they choose, plead their own cause, or a prisoner conduct his own defence.

Restrictions on solicitors.

None but barristers, or as they are often called, "counsel," can act as advocates in the superior courts, but both barristers and solicitors may plead in the county courts, and before the magistrates. In practice, barristers alone appear as advocates at Quarter Sessions.

Barrister's fee called an "honorarium."

A barrister is not supposed to work for hire, and therefore is not liable for negligence or incompetency. What he receives for his services is called an "honorarium," and if this is not paid, he cannot recover it at law. He cannot take his instructions directly from the person who wishes to have his assistance. He must be instructed through a solicitor, who sees the witnesses, procures the evidence, and prepares what is called a "brief" which contains the comments on the case, and the evidence.

The brief.

This "brief" is endorsed at the back with the barrister's name, and the number of guineas which is to be the fee.

Note.

Barristers always are paid in guineas, and a barrister's guinea is something more than one pound one shilling, for it includes a fee for his clerk.

The "brief" is then presented to the barrister, or his clerk, and from it he gathers the particulars of the case.

Improper advocacy.

It is sometimes said that the advocate is one who tries to make white what he knows is black, and argues that a prisoner, whom he knows to be guilty, is innocent.

It must be admitted that advocacy is not exempt from this risk. An advocate, especially when young, may, in

[1] The question of admitting women to plead in the courts is being much discussed at the present time.

his enthusiasm for his client, express by his manner and words a belief in the justice of his cause which he cannot really feel.

No part of advocate's duty.

But this is no part of the duty of an advocate. In the first place he never expresses his own opinion. He only "humbly submits" arguments and views to the judges and juries.

His duty is only to do that for the client which the client himself would do, if it were not for his unfamiliarity with courts, and his ignorance of the rules of evidence and procedure.

That this can be done without violating any rule of honourable conduct, or fairness, has been shown by the history of the English bar for centuries.

How to become a barrister.

If a boy wishes to be a barrister, he must become a member of one of the "Inns of Court."

Inns of Court.

There are four Inns of Court, all situate in London, and called, "Lincoln's Inn," "The Inner Temple," "The Middle Temple" and "Gray's Inn."

Unless he has matriculated at a university, he must pass an entrance examination.

The course extends over three years. During this time he must dine six nights at least each term in hall,[1] and pass examinations in Roman, Constitutional and English law.

The fees payable are about £150.

Benchers.

Each of the Inns of Court is governed by certain barristers and judges called "Benchers." The Benchers have the right of "calling to the Bar," and exercise discipline over their members. In extreme cases of misconduct they can disbar, that is, turn the barrister out of the profession.

After a student is called to the Bar, he generally reads for a year as a pupil, in the chambers of a barrister in practice.

"Devilling."

A young barrister often gets his early practice in advocacy by taking cases for another barrister who is too busy to attend to them himself. This is called "devilling." The barrister to whom the case belongs

[1] If at the University three nights are sufficient.

takes the fee marked on the brief, and the young barrister gets the experience.

Circuit.

Soon after being called to the Bar a barrister should join a Circuit, so that he may go round with the judges when they proceed on circuit to hold the Assizes.

England and Wales are divided into eight Circuits. He can only join one Circuit, and having joined, cannot change it. Thus a barrister is said to select his "Circuit" as he does his wife, *i.e.* for life.

He is permitted to appear at one or more Quarter Sessions on his Circuit, and also Borough or Town Sessions.

King's Counsel.

When a barrister has won a position at the Bar he may apply to the Lord Chancellor, asking to be made a "King's Counsel." This is called "applying for silk." King's Counsel date from the time of Elizabeth. Francis Bacon was the first King's Counsel.

The Lord Chancellor recommends such persons as he thinks proper to the Crown, and they are appointed as "His Majesty's Counsel learned in the law" by letters patent.

A King's Counsel is called a "leader." All other barristers, quite irrespective of their age, are called "juniors."

The leader wears a silk gown, in place of a "stuff" one, sits in the front row in the King's courts, and generally has a "junior" associated with him in any case he conducts.

The two principals of His Majesty's Counsel are called the "Attorney General," and the "Solicitor General."

Attorney and Solicitor General.

They are members of the Government, and advise the Government on all law matters.

They are paid high salaries, for now they are not permitted to take private practice.

Solicitors.

To become a solicitor, a boy, after passing a preliminary examination, is "articled" to another solicitor and serves him as an articled clerk for five years.

If he has taken a university degree, three years is the term of service.

The stamp fee on articles of clerkship is £80, and it is usual to pay a premium to the solicitor to whom he is articled.

Solicitors are officers of the High Court, who exercise disciplinary power over them, and can, for misconduct, strike them off the Roll of Solicitors.

Much of this discipline and control, however, the judges have relegated to a society, composed of many leading members of the solicitors' profession, called the Incorporated Law Society, who manage the course of study and the law examinations. Discipline.

Before admission as a solicitor the student has to pass both an intermediate and a final examination in English law. Examinations.

He has also to take out an annual certificate entitling him to practise.

CHAPTER V

CONCERNING PERSONAL RIGHTS

"Qui jure suo utitur neminem lædit." LAW MAXIM.

Blackstone's classification of rights and wrongs.

BLACKSTONE says "all law is concerned with rights and wrongs." He then divides "rights" thus:

I. Personal Rights.
II. Rights of Property.
III. Rights arising from Private Relationships.
IV. *Public Rights.*

And "wrongs" thus:

I. Civil Injuries (*torts*).
II. Crimes.

The writer does not purpose dealing at all with *Public Rights*, nor to follow Blackstone closely in his classification of rights and wrongs.

Personal rights.

The present chapter is concerned alone with personal rights and rights of property, which may be said to be personal rights. Rights to and over property are dealt with more fully in subsequent chapters.

EVERYBODY HAS LEGAL RIGHTS

If it is the fact, and undoubtedly it is, that every person in England possesses rights, it follows that no other person may interfere with him in his exercise and enjoyment of such rights, and that if any other person does so, he commits a wrong.

Such a wrong may only injure the private rights of the person injured. It is then called a "private wrong," but it may be of so serious a kind as to be an injury to the community as well, or an offence against the King's peace, in which case it is also "a crime."

Chief personal rights.

The chief personal rights are:—

(*a*) The right of liberty.
(*b*) The right of bodily security.
(*c*) The right of preservation of character.
(*d*) The rights of property.

(*a*) *Liberty.*

Every Englishman has a right to personal liberty, which involves the right of staying or going where he wishes, at his own will and pleasure, without hindrance from others. Right to personal liberty.

"No freeman shall be taken or imprisoned, but by the lawful judgment of his peers (*i.e.* equals) or by the law of the land."—Magna Charta.

No person, even of the highest rank, can now imprison an English subject. Only the law, after proper process, or trial, can do this.

Even the least detention of a person against his will amounts in law to an imprisonment, and the person so imprisoning another, unless he has good legal excuse, is liable to an action and must pay damages for false imprisonment, for he has infringed the other's right to liberty. What amounts to imprisonment.

If a person is wrongfully imprisoned for a length of time another remedy is open to him.

Every schoolboy has read of the "Habeas Corpus Act." Since 1679, when this famous Act was passed, any person who is imprisoned may obtain, or his friends may obtain for him, from the Court of King's Bench (now the King's Bench Division), what is known as a "writ of Habeas Corpus" commanding the person or persons detaining or imprisoning such person to produce him in the court. The court, if the imprisonment cannot be justified, releases him. Writ of Habeas Corpus.

The writ of Habeas Corpus is not granted as of right. Reasonable grounds must be shown, but when it is once granted no excuse is admitted. It must be obeyed.

It is only when the Habeas Corpus Act is suspended that persons may be imprisoned on suspicion, and not brought to trial.

This can only be done by Parliament.

(*b*) *Security.*

The personal security of every Englishman is protected by law. Personal security includes protection, not of a man's life alone, but also of his limbs and his body generally. Right to personal security.

Therefore if any one assaults another, whether seriously or slightly, this is an interference with such person's right to bodily security.

(*c*) *Reputation or Character.*

Right to reputation or character.

We shall explain the terms "libel" and "slander" later (see *post* p. 170). They both mean taking away or injuring the character of a person, and either of them constitutes an interference with his right to the preservation of his character.

(*d*) *Property.*

Rights of property.

To deprive a person of his property, or to injure his property or to withhold it from him, is an interference with such person's rights of property.

Any system of law which protected the liberty and personal security and character of a man, but did not also protect his property, would be a very faulty system.

The law of England protects, and has always protected, the enjoyment of property which has been legally acquired, with the utmost vigilance.

It was formerly said that offences against property were punished more severely than any other sort of offence.

This is not so now.

The law provides remedies for infringement of rights.

For all interferences with or injuries to the rights above described, whether to liberty, bodily security, character, or property, the law gives appropriate remedies to the person injured.

Must not take law into one's own hands.

The general rule is that it must be left to the law to redress the injury, and not to the injured party himself.

The maxim is: "No one must take the law into his own hands."

Exceptions to rule.

To this maxim there are several exceptions.

Thus, if a person is unlawfully imprisoned, he may escape if he can, and even use a moderate amount of force, if it is necessary to effect his escape.

Self-defence.

Again, if his life, or limbs, or bodily safety, or health is endangered by another by force, the law permits the person in peril to defend himself.

Duty to preserve one's life.

Every man owes a duty to the law to endeavour to preserve his own life. For this reason suicide is an offence against the law.

True, the law cannot directly punish a man who commits suicide, but, until the year 1824, if the Coroner's jury returned a verdict that he had feloniously killed

himself (*felo de se*), his body was always buried at night at four cross roads, with a stake driven through it.

> "And they buried Ben at four cross roads
> With a *stake* in his inside."—Tom Hood.

It is also a man's duty to preserve his limbs—in early times for the reason that he might have his fighting powers intact.

He may defend himself against all assaults.

Self-defence is said to be "the first law of nature," and, as previously stated, the law of nature forms part of the law of England.

Limits to self-defence.

Self-defence, though permitted and right, is always attended with a certain amount of risk.

The law does not allow any more force to be used in self-defence than is necessary to repel the attack.

At the same time the law acknowledges that it is very difficult for a person attacked to know the exact amount of force he should use in self-defence.

It is only in a very gross case that the law will punish one, who in self-defence exceeds reasonable limits.

Illustration.

One illustration will suffice. If a man, attacked by another in an ordinary way, with his fists, should pull out his revolver and kill his assailant, the law would probably, though even in this case not necessarily, consider this as an unjustifiable killing, because it went beyond mere self-defence.

If character attacked.

If, however, a man's character is attacked he must leave it to the law to redress this injury. In this case he may *not* take the law into his own hands, and the reason is that there is no immediate necessity to redress such an injury.

Retaking property peacefully.

If anyone is wrongly deprived of his property, and he can peacefully retake it, he may do so, but, it is the better opinion he cannot use force to obtain it again [1] except in a case of what is called "hot pursuit."

"Hot pursuit."

This is an illustration of what "hot pursuit" means. If a thief snatches your watch, you may run after him and take it from him by force, for this is "hot pursuit," but

[1] An Act of Richard II. expressly forbids a person to retake his land by force, and the better opinion is that the same rule applies to retaking personal property.

if he had succeeded in getting away with it, and you afterwards find out where he lives, you cannot go to his house and by force take back your watch.

In this case you could either prosecute him, or sue him to recover the watch.

Duress.

It follows from the protection the law always affords to personal liberty and personal security, that if a person should be induced by fear of loss of life, or injury, or unlawful imprisonment, to do any act, or sign any document, such as, for example, a document by which he parts with his property, or surrenders what belongs to him, such an act is not binding upon him.

No matter how solemn a promise he may have made, the law considers it as procured by "duress," and regards the whole proceeding as null and void.

Two other cases, where it is permitted to a man to redress his own injury may be mentioned.

Nuisance may be abated.

If a nuisance exists which injures a person's rights, either in his private capacity or as a member of the public, he may peacefully remove or even sometimes destroy such nuisance.

Examples.

If a person erects or places something on a public highway which interferes with your right of passing along it, you may remove or pull down such an obstruction, but it must be done peaceably.

If trees project over your land you may cut off the overhanging boughs.

Landlord may distrain for his rent.

Again, a landlord may himself seize his tenants' goods for any rent which may be in arrear. This is called "putting in a distress for rent." This is really redressing his own injury, for he does not apply to any court before seizing the goods, but this is a very old right.

It must be remembered that the various ways above described, by which a person is permitted himself to redress his own injury, are but exceptions to a rule.

The general rule.

The rule is that the law redresses every violation of a right which amounts to a legal injury. The maxim that "for every wrong there is a remedy" states the principle somewhat too widely. Perhaps the more correct way to state it would be to say that "for every *legal* wrong *causing loss* there is a remedy."

To violate the legal right of another without legal excuse is called in law *injuria*. The *injuria* is the violation of the right. If this results in loss—*damnum* as it is called—the *injuria* and the *damnum* together give a right of action, that is, a right to recover damages. *Injuria.*

Sometimes *injuria* alone without loss will give a right to recover at least nominal damages, but *damnum* without *injuria* never does. *Damnum sine injuria.*

It may well happen that a man using his own property, and using it quite lawfully, may cause some loss to the property of his neighbour. Here there is *damnum* but no *injuria*—consequently no right of action.

Examples.

(1) A builds on the edge of his own land. This he has a perfect right to do, but the effect may be that his neighbour's land is not so suitable for building purposes as it was before, and is thus of less value. "*Damnum sine injuria*," says the law.

(2) A, without any negligence or want of care, knocks B down with his motor-car and seriously injures him. Again, *damnum sine injuria.*

In some few cases there may be both *injuria* and *damnum* and yet no legal right of action, for the loss, though but for the injuria it would not have resulted, may be too far removed from the injuria to be in law attributable to it. The law then says the damage is too remote. Loss too remote.

Example.

A, owing to his train being unreasonably late, misses an appointment and thus loses an important situation of £1000 a year. The railway company is not liable for such a loss, for though both *injuria* and *damnum* existed, the damage is too remote.

Still the rule is almost invariable that *injuria* causing loss gives a right of action.

Rights of Property

Rights regarding property form a very large part of the law of England. Rights of property.

These rights include the divisions of property, the

various ways in which it may be acquired, the methods by which it is transferred from one person to another, the law relating to contracts, etc., etc.

The field is such a large one to wander over, even in a very general way, that it must be entered on in a new chapter.

CHAPTER VI

THE LEGAL DIVISION OF PROPERTY. REAL PROPERTY

"Land gives one position, and prevents one from keeping it up." WILDE

Division of Property

The divisions of property.

If a schoolboy should be asked how many sorts of property exist in England, he would probably reply in schoolboy vernacular, "No end of sorts."

This is not so. The law only recognises two sorts of property—

1. Real property (*immoveable property*).
2. Personal property (*moveable property*).

Blackstone's definition.

Blackstone says, "*Things real* are such as are permanent, fixed and immoveable, which cannot be carried out of their place, as lands or tenements[1]; *things personal* are goods, money, and all moveables, which may attend the owner's person wherever he thinks proper to go."

Real property is land.

Real property then is land, which includes all buildings fixed upon it. Even water is regarded as land, and conveyed as "land covered with water."

Land includes all below it, and above it to an indefinite extent. "*Cujus est solum, ejus est usque ad cœlum.*" (To whom the soil belongs, to him belongs even to the sky.)

Personal property is property which is not land.

Personal property is every kind of property except real property.[2]

Law of real property.

In this and the following chapters it is intended to consider the law as it affects land, *i.e.* real property.

[1] The expression "lands, tenements, and hereditaments," so often used, means lands ("tenements") buildings, or more properly things the subject of tenure (to be hereafter explained, see p. 66), and hereditaments, things which descend to the heir.

[2] This statement will require later some explanation.

Land

No private person can own land.

Should the schoolboy before mentioned be questioned as to whether his father owns any land, he would very likely reply, "Yes, he owns a lot of land."

He is wrong again. His father owns no land, unless he happens to be the King of England, in which case he owns it all.

Every acre of English soil held by subjects of the Crown is "held of" the King. The so-called owner, who enjoys all the rights of ownership is not the owner. He can only possess what is called an "*estate*" or interest in the land, and this he holds, though he probably does not know it, either directly or indirectly of the King. It is correct to say that a person *holds* lands, not that he owns them. This is a fact that must never be forgotten. The King owns the land. His subjects own "estates" [1] in the land.

On this one fact depends a large part of the law of real property.

The feudal system.

All this results from the feudal system, which, to whatever extent it existed here before the Conquest, was firmly, and with all its Norman characteristics, established in England by William I and his immediate successors.

By the Conquest William became possessed of much English land, which he granted to his Norman followers on feudal holdings.

Knight's service.

In the year 1086 all the great landowners in England attended the King at Sarum and consented to become his tenants, and did homage to him, *i.e.* each of them, kneeling down, declared himself "his man" as though they had in every case received their lands as a grant from him.[2]

So they all became tenants of the King, not quite in the sense in which we now speak of a tenant of a house, but as holding their estates in the land from him, generally, though not always, in return for military service.

All lands in England are *holden*, and they are consequently called *tenements*. The possessors are called

[1] These "Estates" are explained later. See Chapter VII.

[2] Land which was *not* held by feudal tenure was called "allodium," land held of no one, but enjoyed as free and independent property. Lord Coke says, speaking of his own time, that no allodial land existed in England.

tenants, and the manner of their possession a *tenure*. (Blackstone.)

Thus came into existence what was called *Knight-Service*, long esteemed the most general and honourable manner of holding land. To constitute such a holding a fixed quantity of land was necessary. This quantity was called a *knight's fee*. The owner of land amounting to a full knight's fee had to attend his lord to the wars for forty days in each year. If he only held half a knight's fee then for twenty days, and so in proportion to his holding. Knight-service.

The large tenants were said to hold their land "*in capite*"—in chief, *i.e.* from the King.

But it was bound to happen that the holders of land direct from the King often wished to part with portions of their land.

What happened then? They adopted the same system as existed between the King and themselves. They transferred the land to their under tenants on the same, or different, conditions to those on which they themselves held it, and constituted themselves the lords of such tenants. This was called "Sub-infeudation," and the lordships thus created were called *mesne* or middle lordships. Sub-infeudation.

Note.

The lord was not deprived of his services by the adoption of this system, for it was always considered that the services were due from the land itself, whoever owned it; but it made it much more difficult for the lord to collect or obtain his services. Accordingly it was declared in Magna Charta that "no free man should give or sell any more of his land than so as what remained might be sufficient to answer the services he owed to his lord."

The original grants were nearly all of a military nature and in the hands of military persons, but they in turn granted out parts of their lands either for military service or for corn, money, cattle, etc.

But these inferior tenants had to take the oath of fealty and the oath of homage, if the holding was military, to their immediate lords, also to attend their courts and to perform their services.

The King's tenants.

The King's relation was with his tenants in chief only. It was no concern of his what they did with their land so long as they performed their military service when liable to do it.

The military service bargain between the King and his tenants was a bargain between them alone, and not with any under-tenants.

"The tenant-in-chief was responsible to the King for his services, which he could perform either by *enfeoffing* (*i.e.* granting land to) mesne tenants and making himself their *lord*, or by hiring knights, or in any other way he chose" (Holdsworth).

At first probably given only for life.

This interest in land granted by the King was at first probably only given to the tenant for his life. But it very soon became hereditary, that is, the heir of the tenant could claim the land.

In the same way the King's tenant at first could only grant it to his tenants for their lives, for this was all the interest he had to grant—but when his own lands became hereditary, those of his tenants often became hereditary likewise.

It will be seen that if this system had been allowed to go on there would have been large numbers of persons exercising feudal lordship over others.

A would receive a large grant of lands from the King (*in capite*). He would grant part of this to B (*enfeoff* B as it was called), and become B's lord. B could do the same to C and become C's lord, and so on *in infinitum*.

System of creating lordships stopped.

But this system of creating new lordships was all stopped by a Statute called, from its opening words, "*Quia Emptores*," passed in 1290, which declared that in all such cases the tenant (or purchaser) should hold the land of the same chief lord as the grantor held from. Thus in the case given above if A, the tenant of the King, granted part of the land to B, he (B) would hold it, not as tenant of A, but as tenant of the King.

No new feudal lordship has thus been created since 1290.

The feudal tenures.

On what conditions did the King and his tenants-in-chief grant lands?

Neither the King nor his tenants, nor their tenants, granted land for nothing.

The various conditions and terms on which they gave it is summed up in the term "feudal tenures." By this is meant the conditions on which feudal lands were held.

They did not sell their rights in the land for a sum of money as is done now. Money was not very plentiful.

Though money was sometimes paid, the chief requirements of feudal lords were submission and services.

These services varied greatly. They can only be touched upon here.

Knight Service

Knight service.

The most general and honourable kind of lay holding (for it will be noticed later that there were ecclesiastical or Church holdings as well) was by *Knight Service*, which was entirely military. This was the typical tenure of the feudal system; the large landowners had to render for their lands a definite number of knights, who in early times had to serve for forty days.

Homage.

The holder of land by military service also took the oath of homage, *i.e.* became the King's or the lord's "man," also the oath of fealty (*fidelitas*) which was a promise of faith to the lord.

Military service was soon commuted by paying a sum of money called "scutage."[1]

Most grants by the King (*in capite*) were at first in return for military service.

The King could distrain, *i.e.* take the goods of his tenant, or the under-tenant, if the rights, or other services for which the land was given, were not rendered to him.

Military service and payment of scutage did not last very long. By the time of Edward I they had both practically disappeared.

The tenant from the King, who had to supply a certain number of knights, might in his turn stipulate that his tenant should supply the knights or a part of them, in which case he would hold the land by Knight Service.

Other incidents of feudal holding.

Though military service and even scutage (the payment of money instead of military service) early fell into disuse

[1] Scutage is said only to have been levied about forty times in all. (Pollock and Maitland.)

the King or the lords who had granted land on Knight Service could still insist on the other incidents of this feudal holding which are about to be mentioned.

These other incidents were :—

A. *Aids to the Lord.*

Aids.

These were generally three in number. (1) Aid in the expense of ransoming the lord if he were taken prisoner. (2) Aid in the expense of making his eldest son a knight. (3) Aid in furnishing a marriage portion for his eldest daughter.

B. *Relief.*

Relief.

When the tenant of feudal land died it became usual to permit his heir to succeed to the land, but the heir always had to pay for this, even when his right to succeed was established.

This payment was called a " Relief."

This payment was finally fixed at the sum of one hundred shillings for every knight's fee—or portion of land.

(This obligation to pay relief was extended to all free tenants whether they held by military service or not. See *post* p. 73. Socage Tenure.)

C. *Primer Seisin.*

Primer seisin.

This was a sort of " relief " but only applied to tenants who held their land directly from the King—*in capite* as it was called. The King had a right, if the heir was of full age, to receive from him one whole year's profit of the lands, if the heir was entitled to succeed immediately. If he was not entitled to succeed at once, then the King took half a year's profits of the land.

(This particular relief was in place of the right the King always had on the death of one of his tenants to enter at once on the land and keep the profits, until the heir proved his right to it.)

D. *Wardship and Marriage.*

Wardship and marriage.

If the heir, being a male, was under twenty-one years of age, or, being a female, under fourteen years of age, at

the time the ancestor died no relief was paid, but such young person did not succeed to the land until he or she attained such age. Meanwhile the lord had control both of the body and the lands of such heir. He was called the Guardian in Chivalry and did not account for what he received from the lands. This right was often valuable.

This wardship continued in the case of boys up to twenty-one years of age, in the case of girls to sixteen years.

He had also the right of disposing of them in marriage ; really selling them in marriage.

Wardship and marriage were incidents of tenure by Knight Service and Grand Serjeanty (see *infra*) only. If the lands were held in socage (see p. 73) the lords had no rights of wardship or marriage.

E. *Escheat.*

Escheat.

If the tenant died without an heir, or was outlawed or convicted of felony, the land reverted to the lord. This was called "*escheat.*"

As the tenant can now leave by will his interest in the land to whom he pleases, and as forfeiture for treason or felony is abolished, escheat has almost disappeared, though occasionally lands escheat to the King. They would escheat to the lord by whom originally granted if he could be found, but there has been no new lordship of freehold lands in fee since the Statute *Quia Emptores.*

Fine on alienation.

In addition to the rights above set out, the lord could demand a fine from the heir who came of age and refused to be knighted provided he held a King's fee, and the King could claim a fine of his tenant *in capite* who parted with his land. If he parted with it without the King's permission, a full year's value of the land became payable. Even though he had permission, a third of a year's value was payable.

So much for tenure of land by military service. All military tenures were abolished in 1660.

Grand Serjeanty

Grand Sergeanty.

Another sort of tenure of land was by *Grand Serjeanty.* Instead of promising to serve the King generally in

his wars the tenant undertook to perform some special personal service to the King himself, such as to carry his banner or his sword, or to be his champion at his coronation. Serjeanty means service or servantship.

Lands were held in serjeanty not only from the King but from nobles—mesne lords as they were called—for what the King did great nobles imitated.

To grant land to be held by serjeanty became a convenient way of recompensing servants for all kinds of servantship.

Petty Sergeanty.

In addition to Grand Serjeanty there was *petty* or small serjeanty, a lower and more trifling sort of service rendered to the King, and to mesne lords.

The supplying "knives or arrows to the King" is given as an instance of Petty Serjeanty. Perhaps the dividing line between Grand Serjeanty and Petty Serjeanty consisted in this: that if lands were held in Grand Serjeanty the lord had the rights of wardship and marriage (see *ante* p. 70), whereas in Petty Serjeanty he had not; but the subject of Petty Serjeanty is a rather involved one.[1]

When, as will be seen, in 1660 all tenures were (as from 1645) turned into the tenure called "free and common socage," the honorary, personal services of Grand Serjeanty were retained.

Frankalmoign

Frank-almoign.

In addition to the tenure of land by lay persons to be held by Knight's Service or Serjeanty, land was often given to religious bodies or persons. This was called a *Spiritual* tenure, and such lands were said to be held in *frankalmoign* (free alms).

Such land was generally held by the grantees for themselves and their successors for ever.

Lands given to God and the saints.

It was regarded as land given to God and the saints. Of course the service required in exchange for such land was not military service. No especial service was stipulated for, though prayers for the soul of the donor and his heirs were doubtless expected.

[1] King John, in Magna Charta, gave up the right to wardship in respect of lands held from him in small serjeanty, "such as that of supplying us with knives or arrows or the like."

No oath of fealty was given.

Many monasteries and religious houses held lands by this tenure; and, it is well worth remembering, the parochial clergy hold their lands to this day in frankalmoign.

Parochial clergy still hold their lands in frankalmoign.

By whatever tenure land is held, the services are in law due from the *land* and not the tenant. It resulted from this that if land was given in frankalmoign by a mesne lord, some services might be due from the land, which the donor might perform himself or agree with the tenant in frankalmoign to perform.

It is not therefore quite correct to say that land held in frankalmoign had never to pay secular service.

Note.

If special divine services were stipulated for such as masses, etc., this was not strictly frankalmoign, but was called "tenure by divine service." If these services were not performed the land could be distrained upon.

Divine service.

If the land was held in frankalmoign, and no secular services were due from it, and no *defined* divine services, the ecclesiastical courts had jurisdiction over any question arising respecting it.

Tenure by frankalmoign was expressly excepted, when, in 1660, tenure by Knight Service was abolished.

Socage

If the tenure of the land was not given for military service, or for purely personal service (serjeanty), and was not spiritual (frankalmoign), it was called "*socage tenure.*" [1]

Tenure by socage.

The services for lands held in socage might vary greatly so long as they were certain. No military service, or scutage in lieu of military service was ever paid, and the lord had no rights of wardship or marriage over the heir who had not attained the customary age.

Incidents of holding land by socage.

The services were generally connected with agriculture.

[1] The meaning of the word "socage" has been much discussed. Bracton, an early writer, believed it came from "*soc*," the French word for a ploughshare. The better definition is that it is a person who must *seek* his lord's *soke* or jurisdiction, and because he must seek his lord's court, is in some manner dependent on him.

Rent.

The tenant might pay rent for the land, or perform labour services or both.

Sometimes the rent was a mere nominal thing, as a rose, or there might be no rent, but only the oath of fealty.

Oath of fealty may be demanded to-day.

The oath of fealty was always due, and can be demanded to this day. This oath of fealty is said to be the origin of the present-day oath of allegiance.

Aids (see *ante* p. 70) were payable, until abolished in 1660, and also a certain kind of "relief" (see *ante* p. 70) and "primer seisin" was due to the King even if the land was socage.

In the year 1660 all tenure by military service was abolished, and it was enacted that all tenures held of the King or other persons should be turned (as from the year 1645, for the Act had a retrospective operation) into free and common socage.

Free tenures.

All the holdings or tenures of land which have been described were *free* tenures, *i.e.* tenures not unworthy of being held by free men.

Unfree Tenures

Unfree tenures are origin of copyholds.

There were, however, other tenures of land called "unfree tenures," a brief description of which must be given, for these holdings are the origin of what is known as "Copyhold" land at the present day.

A barony.

A person who held a considerable quantity of land by Knight's Service was said to hold a "barony." A barony is said to have been only an aggregate of lands held by knights' fees.[1] (Pollock and Maitland.) There was generally some castle or manor on the land regarded as the head of the barony. The barons, as large holders of land, were men of importance, and generally summoned by the King to his Parliament. They had their own courts.

Villeins.

Although the holder of a barony could, of course, grant some of his lands to others to be held by Knight's Service, or in socage, he had a number of persons on the land who were called "villeins," and who generally cultivated the land which the lord kept in his own possession—his *demesne* as it was called. The word "villain" has

[1] There was a distinction as to "relief" (see *ante* p. 70) between tenure by barony, and tenure by knight's service, which need not here be explained.

come to mean a person of bad character, but this was not the original meaning of the word. It only meant a person who held his land at the lord's pleasure by menial services.[1] Villeinage was a status, as well as a tenure of land. The villein was a very poor man, sometimes free, and sometimes, if not a slave, something very like it.

Villeinage.

The services he rendered the lord were usually of an agricultural nature, and the lord had a right to vary the services,[2] and in return the villein held a small portion of land for himself.

He had no protection or rights in the King's Courts at all. Originally he held the land cultivated for himself at the will of his lord. The land belonged to the lord, but the villein tenant held it by custom, and this custom was the custom of the manor. His services were in later times set out on the *rolls*, or writings, of the manor. Hence he held according to the customs of the court-roll, or "*copy* of the court-roll," and this is the origin of "copyhold" holdings.

Villein had no protection against the lord.

Though the tenant in villeinage was not, as previously stated, protected by the King's courts, he was protected by his lord's court, though not against the lord himself.

Was only protected in the lord's court.

Though the customs of the manors might vary they often required certain payments from the tenants, *e.g.* a payment on the marriage of his son or daughter (a great test of whether the tenant held by unfree service), a payment (or heriot) by the widow on his death, etc.

The lords sometimes altered the customs of the manor, generally for the purpose of increasing the burdens laid on the customary tenants. The religious establishments who possessed land held by villein services are said to have been the greatest offenders in these respects.

Conditions of holding sometimes altered.

After a time it became customary that the tenant's heir should succeed to the land, not necessarily his eldest son; it might be his widow, or his youngest son, and the tenant secured the right that he should not be turned out of his holding, so long as he performed the customary services.

Villeinage after lapse of time.

[1] The word comes from "villa," a farmhouse.

[2] The right of the lord to vary the services and times at which such service should be performed was really the best test as to whether the holding was a free or an unfree holding.

These customary services in turn became exchanged for a rent payable in money or goods.

The villein becomes the copyholder.

The tenants acquired the right to sell their land. They at length got the protection of the royal courts and *tenure in villeinage may be said to change its name to copyhold tenure.* The villein becomes the copyholder.

There is no imputation of social inferiority now in holding copyhold land. It has for a long period been bought and sold like other land, but its characteristics still remain. The holder of copyholds to-day holds them by "copy of the Court-roll" according to "the custom of the manor," of which they form a part, and though he has full rights over the land, he is still, strangely enough, said to hold it "at the will of the lord."

Summing up.

To endeavour to sum up what has been written in this chapter. At the commencement we stated that the King was the owner of all the land in England, and no subject held more than an *estate* in the land. This has been shown to be so by the operation of the feudal system, and the Statute of *Quia Emptores*, which prohibited from the year 1290 the creation of any intermediate lordship by free tenants who wished to dispose of parts of their lands.

Holding by Knight's Service and Petty Serjeanty were abolished in 1660. After this, land was ordinarily held in "free and common socage," but Grand Serjeanty and frankalmoign still exist.

Rents have superseded homage and personal services, and even rents now are rarely payable.

The origin of copyhold lands from the small holdings of villeins has also been traced.

In the next chapter we purpose showing how land is conveyed, that is, passed from one person to another, and the various interests or estates which a person can hold in land.

CHAPTER VII

SHOWING THE WAYS IN WHICH LAND WAS, AND NOW IS, CONVEYED OR TRANSFERRED

"*Antiquis debetur veneratio.*" ERASMUS

How is land conveyed? By *conveyed* is meant transferred from one person to another. Conveyance of land.

Again we must transgress our rule, and dive somewhat into history. We are speaking of freeholds. Copyholds and leaseholds are considered later.

Note.

Leaseholds are not real property at all, no matter how long the leases may be. They are *personal* property.

The most primitive and natural way for one person to transfer a thing to another is to hand it over to him. Primitive way of transferring property.

If a schoolboy wishes to give his bat to another boy he hands it over to him, and by this act regards the ownership of the bat to have passed away from himself to the other boy.

If he wishes to change his bat for the other boy's tennis racket each hands his article to the other, and regards the ownership as changed, as indeed it is.

Let us suppose, however, that a boy has a small field and wishes to transfer it to another boy, either as a gift, or in return for some other thing, or for money. What is to be done then? Difficulty in case of land.

He cannot take the field in his hands and hand it over as he would a bat or a tennis racket.

Yet this, or something very like it, is what our ancestors did. Early principle of handing it over.

If a person had possession of a freehold estate in land he was said to have "seisin" of it. Seisin only means Seisin.

legal possession.[1] Just as one would say a man has ownership of a horse, in the same way one said he has seisin of a field or estate.

Mode of transferring the seisin.

To transfer this seisin, and so to transfer the land, the parties would go upon the land, and a piece of soil, or sometimes a bough or twig of a tree would be handed by the person parting with the land to the person receiving it. This ceremony was called "*livery of seisin*" —the word "livery" meaning delivery. The person *seised* was the only person who could transfer the freehold of the land.

It was this livery, or delivery, of either an actual part of the land itself, or something representing the land, that transferred it from the one person to the other. Certain words were said, such as *Do* (I give) or *Dedi* (I have given) and from early times some writing would set out the conditions on which the land was conveyed, and the estate which was intended to be conveyed, but *it was not the writing that transferred the land*, but the ceremony of the delivery of the seisin.[2]

Old mode still exists but is antiquated.

Such manner of conveying land from one person to another still exists, though in practice it is not used.

Statute of Frauds.

A very well-known Act of Parliament called "the Statute of Frauds" was passed in 1677 which said that no action should be brought on a contract to sell land unless there was a note or memorandum of the sale *in writing*, and signed by the party to be charged (*i.e.* the person whom it was wished to sue on the contract) or his agent.

The writing never transferred the land.

Here again it must be remembered that although there was a contract to sell the land, and a note of it in writing as the Statute of Frauds required, the writing *did not pass the land* but only gave a right to it. It had still to be conveyed in some form or other.

It is clear that the transfer of land by delivery of *seisin* was a very troublesome and cumbrous method. Both the parties had to *go on to the land*, and this was very

[1] "The man who is *seised* is the man who is sitting on land. When he was put in *seisin*, he was set there and made to sit there."

[2] If the parties did not go on the land, but only in sight of it, and then went through the ceremony, this was an imperfect delivery of seisin, and was not good until the person to whom delivery had been made entered on the land.

inconvenient, especially if they lived at a distance from the land.

New modes of transfer used.

It is not surprising that attempts were made to find easier ways in which to transfer land. These attempts succeeded to some extent, and in later times the following plans were resorted to.

Lease and Release

Common law lease and release.

If a person had a lease, or letting of the land, say for one year, *and he had entered the land under the lease*, and wanted to buy it out and out, the owner could, by a deed (*i.e.* a writing under seal [1]), transfer the land to him. In this case delivery of the seisin was not necessary, for the purchaser was already in possession of the land under the lease.

Consequently this method was often resorted to. If A wished to sell land to B he would give B a lease of the land for one year. When B had entered on the land A could by a written deed transfer to him the whole of his remaining interest in the land.

Lease and release a cumbrous mode of transfer.

But this was also a very awkward way, for it necessitated *two* writings, first the lease, and secondly the release, and in addition B had to enter on the land before the second writing could be made to him.

Since the year 1841 it was not necessary to have two writings. If a deed of Release was made the law assumed that there had been a previous lease, although in fact there had not been.

Conveyance by Operation of Statute of Uses

The Statute of Uses, 1535.

In the reign of Henry VIII was passed a celebrated statute called the "Statute of Uses." It was *not* passed to facilitate the transfer of land, though the lawyers very ingeniously used it for this purpose.

To show how they made use of it is difficult and technical, and we fear will be found a *pons asinorum* for schoolboys.

Still some attempt to explain it must be made. Though difficult, it will not need Lord Macaulay's abnormal schoolboy to understand it.

[1] The meaning of a "deed" is explained later, see p. 114.

Explanation of the *use* of land.

The *use* of land was very ancient. It meant the beneficial ownership of land as opposed to the legal ownership.

Rule in equity.

As previously stated (see p. 19) the law only recognized as owner of freehold land the person who had the land delivered to him by *livery of seisin*. But the Equity Courts recognized that, although a man had the seisin, the land was not, or rather the profits of the land might not be intended for him. He was often intended to be merely a *trustee*, as, for example, for infant children, or for another person.

Illustration.

Take this illustration: Land was transferred to A *to the use of* B, C and D. Here A would have delivery of the seisin, and was the owner *in law*. But the Courts of Equity said the land was intended for B, C and D. You must use it, such courts said, for their benefit, and they must have all the profits of it. A was therefore treated, though he was the legal owner, as trustee merely for B, C and D, for B, C and D had the *use* of the land.

Advantages of the *use* of land.

Giving land to one person to the use of another had various advantages. If a person was guilty of serious crime he forfeited his land, but if another person held the lands *to his use* the *use* was not forfeited. Therefore if a man contemplated committing treason he gave the land by livery of seisin to another person to hold *to the use of himself*. In this way he contrived not to forfeit his land.

Object of Statute of Uses.

The object of the Statute of Uses was to destroy these *uses* of lands. The statute said that if a person had the *use* of freehold land he should be henceforth deemed to have lawful seisin and possession of such land.

Illustration.

The statute turned his *use* into a legal estate and made him the legal owner.

Just see how this worked out. Take the last illustration: the man who intended to commit treason and yet not forfeit his land. Suppose he conveyed it to B *to the use of himself* and then committed treason. His lands would be forfeited. It was no good saying he only had the *use* of the land and that could not be forfeited. The answer would be the Statute of Uses has turned your use into lawful seisin, and you are *now*

owner of the lands in law; and consequently by your treason you forfeit them.

After the statute it was for a time useless to give land to one person to the use of another, for the very moment this was done the person who had the use became the *legal owner* by the operation of the statute.

Ingenuity of the lawyers.

But it takes a great deal to defeat the ingenuity of lawyers. They found a way to evade the statute, and render it useless for the purpose for which it was passed.

How they evaded the statute.

This is how they did it. They said the statute only speaks of *the* use, *i.e.* one use, and so can only turn one use into legal possession. Suppose we try *two* uses, the statute can deal with the first, but not the second. And this turned out to be correct.

Now to take our illustration again of the man who contemplated treason and yet wished to keep his land.

Illustration.

If he, A, conveyed it to B to the use of himself the statute made him the legal owner again *in an instant*, but if he conveyed it to B *to the use of* C *to the use of himself*, the statute made C the legal owner and was then said to have exhausted itself. It could not turn another use into a legal possession, and so A did not get legal possession back again. Henceforth C was owner in law, but, as before stated, Equity would insist on his giving all the beneficial rights and profits of the land to A.

How statute was used to create new modes of transfer.

Now see how cleverly the lawyers made use of the Statute of Uses to simplify the transfer of land, and to avoid the necesssity of the parties going on the land.

Bargain and Sale

Bargain and sale.

If a person bargained to sell freehold land, and received the money for it, he remained before the Statute of Uses still the legal owner. But this was grossly unfair. Again the Courts of Equity stepped in and said we regard you, as you have been paid for the land, as holding it to *the use of* the purchaser. After the statute this *use* was at once converted into lawful seisin and possession, and the purchaser got legal ownership without any livery of seisin.[1]

[1] An owner of land could convey to his wife, child, or relative, by covenanting (*i.e.* promising by deed), in consideration of natural love and affection, to stand seised of it to the use of such relative. The Statute of Uses operated on this *use* in the same way.

This mode of conveyance of land was called " Bargain and Sale."

Note.

Conveyances by Bargain and Sale had to be enrolled in Court within six months, and this of course became known.

Lease and Release

Lease and Release under the statute.

Still another and more secret way of conveying freehold land was invented. We have spoken (*ante* p. 79) of the old Lease and Release which required two writings and also entry on the land.

By the operation of the Statute of Uses all that was now necessary was to *bargain* for a lease for a year for some payment. Then Equity held that the grantor of the lease held it *to the use of* the person to whom it was made for one year, and the statute gave him seisin and possession for one year. A deed of Release by the grantor of his remaining interest was then all that was necessary to pass the freehold in the land.

No entry on the land was required, and no enrolment.

No two writings necessary after 1841.

As stated (*ante* p. 79) after 1841 it was not necessary to have two writings under seal. If a deed of Release was made, the law would not allow the parties to say that there had not been a previous lease though in fact none had been made.

Present mode of conveying land.

At last, after many hundreds of years, during which the various modes of conveying freehold land which we have described had been insisted on, an Act of Parliament was passed in 1845, which allowed freehold land to be conveyed from one person to another simply by an instrument in writing called " a deed." No entry on the land is now necessary, no two writings, no Bargain and Sale, no Lease and Release. Simply a deed, signed, sealed, and delivered (see *post* p. 114).

Conveyance of Copyhold Land

How copyhold land is transferred.

Copyhold land has already been spoken of (*ante* p. 74). To transfer such land there was never any necessity for delivery of the seisin, for the seisin was in the lord.

Copyhold land always has been, and still is, transferred from one person to another in an entirely different way.

The person who holds copyhold land holds by copy of Court-roll of the manor to which it belongs.

If he wishes to transfer the land he *surrenders* it to the lord of the manor, or generally to his steward, sometimes by delivering to his steward a rod, or other symbol of his holding. The steward then enters the new purchaser in the book or roll of the manor as the present holder, and the transfer is complete.

Surrender to the lord.

New owner placed on court-roll.

No new copyhold lands can be created, they only exist by immemorial custom.

The whole of the foregoing part of this chapter has dealt with the various ways by which freehold and copyhold lands can be transferred during lifetime (*inter vivos*), but everybody knows that at the present day he may have land left to him by will.

Conveyance by will.

In such a case it is *the will itself* which passed the land to the person to whom it was left.

The will alone conveys land.

No other conveyance or form was necessary.

In early times and when the feudal system was flourishing in England it seems to have been thought that though a man could dispose of his land *during his lifetime*, he ought not to be permitted to leave it by will.

History of right to leave land by will.

This was quite natural, for, if he did so the lord was often deprived of his chance of succeeding to the lands and the heir was also deprived, and the lord might have a new owner thrust upon him for whom he did not care.

The use of land, after the Statute of Uses, could be left by will, but not the land itself.

In 1540 an Act of Parliament allowed all absolute owners of freehold land (except married women, infants and insane persons) to leave by will *two-thirds* of their lands held by Knight's Service, and *all* their land held in free and common socage (see p. 73).

Limited right to leave land by will.

When, as we have already seen, in 1660 all land was held in free and common socage the owner could naturally dispose of all his land by his will.

After 1660 all land could be given by will.

Now by the Wills Act, 1837, every person of full age, *i.e.* twenty-one years, may dispose of all his land,

Present Act of 1837.

freehold or copyhold, and every interest that he may have in land by his will.[1]

Summing up.

Now to sum up what has been said in this chapter. We have seen that freehold land was first transferred by symbolical delivery, called "livery of seisin." That later another mode was devised by Lease and Release, but still the person to whom the lease was made—the lessee as he is called—had to enter on the land before he could get the remaining interest in the land by the deed of Release.

Conveyance of freeholds.

We have seen that when the Statute of Uses came into force a purchaser who paid for the land was held to have the *use* of it, and this use was turned immediately by the operation of the Act into legal possession, without entry on the land.

Then the old form of Lease and Release after the statute was even more useful, for it was a secret form of conveyance and need not be enrolled.

Simply a bargain for a lease for a year, and then the use turned into legal seisin and possession, and a deed of Release.

After 1841 no lease. Only a deed of Release.

After 1845 land transferred by one instrument in writing, called "a deed."

Copyholds, transfer of.

We have also pointed out how copyhold land, *i.e.* land formerly held by the *villeins* of a manor, is conveyed by surrender to the lord, and the name of the new owner being entered in the roll book of the manor.

Transfer by will.

The gradual right, which is now fully possessed by every person over twenty-one years of age, to leave his land, of whatever kind it may be, by his will, has also been alluded to.

[1] As to the way of making a will, see *post* p. 108.

CHAPTER VIII

OF THE FREEHOLD ESTATES AND INTERESTS WHICH MAY BE HELD IN LAND

"The truth is, the old feudal law in England still exists to a very great extent." KAY, L.J.

Estates only can be held in land.

IT is again necessary to give the reminder that no one but the King owns English land.

The King's subjects can only hold *estates* in the land. By an *estate* in land is meant the interest in land which a person may possess.

If a man has a horse or a carriage, or a motor car, he generally owns it out and out. He has either bought it, or perhaps received it as a gift; but it would be very unusual for him to own it for his life only, or for the life of himself and whoever was his heir after his death.

Yet this is precisely what has always happened in the case of land.

No absolute ownership.

A possession limited for his life, or for his life and that of his heirs, is all the owner of freehold land has ever possessed, certainly since the feudal system became general in England.

The expression "freehold" is very generally misunderstood. If a man in the present day has bought his land out and out, he usually says he has the "freehold." So he has, but he equally has the freehold of the land if he only has it for his life, or for his life and the life of his descendants.

Three great freehold estates.

The three great freehold estates are:

(A) An estate for life.
(B) An estate in tail.
(C) An estate in fee simple.

Of these three, the estate for life is the smallest freehold estate, and the estate in fee simple the largest. We will consider them in their order.

(A) An Estate for Life

Estate for life.

This is the oldest estate in freehold land. When the King or his nobles granted land for Knight's Service, or other service, though probably strictly only a grant for life, still very shortly it became customary that the heir of the tenant for life should succeed to the lands.

Still a delivery of seisin of land to A by name gave him the land only for so long as he lived.

This rule remains at the present day.

Land given to A gives him only an estate for life.

As stated, land may now be conveyed by a written instrument called a "deed," but if the deed only gives or transfers the land to A, without adding other words, A gets the land for his life only.[1]

Words necessary to increase the gift.

If it is wished to convey more than an estate for life the words, "to him and the heirs of his body" or "to him and his heirs" must be added (see *post* pp. 89–91).

A tenancy for life is the smallest estate that can be held in freehold lands, but it is a freehold estate.

The owner of it has the freehold, for in former times he would have had the seisin delivered to him.

Life estate is a freehold estate.

The importance attached to having the freehold of land will appear from the following illustration :—

Illustration.

> A is owner of land for his life. This same land has been let to B for 99 years and A as life tenant receives the rent. Suppose A buys the lease. Then he has a lease for 99 years *and* an estate for life in the same land.

The rule of law is that if a person holds two estates or interests in the same land, the lesser one merges in the greater and becomes extinguished. A has two interests in the land, his estate for his life, and the lease for 99 years. Which is the greater? The 99 years' lease would probably be the answer, for A will not live 99 years. It is not so. The lease is only a chattel interest in land—*not real property at all*—and the tenancy for life is an estate of freehold.

A has the freehold, and the lease for 99 years merges in this and is extinguished. The same thing would have happened if the lease had been for 999 years.

[1] The law is not so strict if the land is given by *will*. The intention more than the actual words used is looked at in interpreting wills.

A tenant for life must use the land reasonably, and therefore must not waste it or injure the rights of those who come after him. He may make leases of the land, and even sell it, but of course the capital money received has to be kept. The life tenant only takes the interest of it.[1]

Tenant for life must use land reasonably.

There are also one or two other minor life estates in land which must be mentioned.

Life Tenant by Curtesy

If a wife has lands of inheritance (*i.e.* either an estate tail or an estate in fee simple [2]) and a child is born who might succeed to the land, then her husband has, *after her death*, an estate for his life in her lands. He becomes life tenant of her lands, and is called in law the "*life tenant by curtesy.*" [3]

Husband's life tenancy by "Curtesy."

It does not matter that the child subsequently dies.

A husband is not his wife's heir to real property, though he succeeds to her personal property, therefore unless the law had given him the estate by curtesy, his wife's lands would have passed altogether away from him to the wife's heirs.

The husband is entitled to his estate of curtesy even out of his wife's equitable lands, *i.e.* lands held in trust for her.

When, as generally now happens, the wife's estates are her *separate property* she may deprive her husband of his estate by curtesy even though a child of the marriage has been born, if she executes a deed to this effect, or says in her will that her husband is *not* to have curtesy in her lands.

Husband may be deprived of it by his wife.

Life Tenant in Dower

Tenancy in Dower is just the converse of tenancy by the curtesy. Tenancy by the curtesy was the husband's

Wife's life tenancy of "Dower."

[1] A man may hold a freehold estate, not for his own life, but for the life of another. If A, a life tenant, parts with his life estate to B then B holds it not so long as *he* shall live, but as long as *A* shall live. This is called a tenancy *pour autre vie*, *i.e.* for the life of another person.

[2] A life estate is of course useless to the husband, for it expires at the wife's death.

[3] The word "curtesy" is said to come from *curtis*, the lord's court, which the husband might have to attend after he came into possession of his wife's lands for his life; but this is doubtful.

right in his wife's lands, tenancy in Dower is the right the wife has in her husband's lands.

Dower. One third of husband's lands.

The wife has a right to receive (not the whole as in the case of the husband) but one-third part of her husband's lands of inheritance, *i.e.* held by him in tail or in fee simple for her life, after his death. This is called *Dower*, and as the wife has it for her life, she has a *freehold life estate*.

How it differs from Curtesy.

One peculiar difference between tenancy by Curtesy and tenancy in Dower is that the husband is entitled to Curtesy out of the wife's lands, which she has possessed *at any time during the marriage*. The wife's right to dower is only out of her husband's lands which he has *at the time of his death*.

Note.

Dower used sometimes to be given at the church door (*ad ostium ecclesiæ*) where the parties met for the purpose of being married. The man would endow his wife with such land as he determined on, sometimes a third, or a half, or even the whole of his lands.

Jointure instead of dower.

If a wife had a competent jointure—or what we should now call settlement—made upon her at the time of marriage, she took this instead of dower.

Now absolutely in husband's power.

In the same way that a wife may now, in respect of lands which are her separate property, deprive her husband of his tenancy by the curtesy, so a man may deprive his wife absolutely of her dower. He may do this by deed, or in his will. A wife is entirely in her husband's hands at the present day, whether she shall get dower or not.

Still if he does not in express terms deprive her of it, and has not parted with the land either during his life-time or by his will, a wife is still entitled to dower.[1]

(B) An Estate in Tail

Estate in tail.

An estate in tail is an estate or interest in land given to a man *and the heirs of his body*. It may be the heirs

[1] By common law a widow not only could not be deprived of her dower, but was entitled to her third part of all the lands her husband had possessed at any time during the marriage.

male of his body, or the heirs female of his body, or both. The heirs of the body signifies the man's lineal descendants.[1]

Common error as to estate in tail.

The expression "an entailed estate" is known to everyone. An erroneous impression exists that there are estates in this country which must preserve this characteristic and descend from father to son, from generation to generation. No such thing exists in England. Such a descent cannot be created in law.

What an entailed estate really is, is best shown by considering its history.

History of estate in tail.

It has been stated above that the early estates in land were estates for life only. After a time it became customary to give a larger estate, and the estate was often conveyed to "*a man and the heirs of his body.*" The person who granted such an estate generally meant that the man should possess it during his life, and that it should go to his descendants after his death, in other words, that the heirs should have a vested right to succeed to the land, and the grantor to receive it back if there were no heirs of his body. From the thirteenth century it was settled that, whether the conveyance was to "A and the heirs of his body" or to "A and his heirs," *the heir got nothing* by the gift.

Words "heirs of the body" or "heirs' give no right to the heir.

Old rule.

The result was this: if a gift or transfer of land was made to "A and his heirs of the body" and he had no heirs of his body, the land would, on A's death, revert to the lord, or person who transferred the land to A. If, however, A had an heir of his body—whether such heir afterwards died or not—he could at once transfer or sell the land to another person absolutely and so disappoint his heir and the lord or transferor of his chance of the reversion. If he did not transfer the land, and his heir died, the donor got the land back again.

It is not surprising to learn that the tenant in tail, as soon as an heir was born, always did sell or transfer the land.

Attempt to stop tenant in tail parting with the land.

The nobles did not at all like this, and in 1285 got a

[1] The heir is the person who holds that capacity at the moment of the death of the person to whom he succeeds. *Nemo est hæres viventis.* A person may be an heir "apparent," *i.e.* the person who will be the heir hereafter, or an heir "presumptive," the person who would be heir if his ancestor died at once, but who may be ousted by the birth of another person.

Statute passed to stop it. The Statute is well known, and is called the Statute "*De Donis Conditionalibus.*"

Statute *De Donis.*

This Statute said that after it was passed the intention of the donor in such a case was to be observed "so that where lands were given *to a man and the heirs of his body* [1] they should, notwithstanding any alienation by the donee, go to his issue, if there were any, and if issue failed, should revert to the donor."

This for a time stopped a tenant in tail from alienating the land. The heirs of his body always succeeded to it, and the donor [2] got it back if there were no heirs of the body.

How Statute *De Donis* was defeated.

But the ingenuity of the lawyers again went to work. By what can only be described as a dodge, the tenant in tail got full control of the land again, and could give it away or sell it absolutely.

It is not necessary to explain in detail what this "dodge" was. The tenant in tail put up someone to bring a fictitious action against him, claiming the land. The tenant in tail then said someone else had warranted it to him. In the end the land was recovered from the tenant in tail, and recovered *not as an estate in tail, but an estate in fee simple,*[3] and the tenant in tail recovered from the person who warranted—but who was always a dummy.

The person who recovered the lands from the tenant in tail could not keep the land, but had to give it back to the tenant in tail.

A Common Recovery.

This ridiculous device to get rid of the Statute De *Donis Conditionalibus* was called a "*Common Recovery.*"

The tenant in tail thus again got full right to dispose of the land. But he must do it during lifetime. He cannot do it by will.

Position of tenant in tail at present day.

Now to come to the present day. The tenant in tail may, whether he has issue born or not, dispose of the land absolutely in his lifetime.

[1] *I.e.* an estate in tail.

[2] The law often speaks of the person who transfers land as the "donor." This does not necessarily mean that he made a gift of the land. If he sold it he is still called "the donor."

[3] Later another fictitious action was used for the same purpose, called "*a fine.*"

No one, however, can create an estate in tail which must descend from father to son in perpetuity.

The reason for this is that the law forbids land to be given "*to the unborn child of an unborn child.*" It may be given to an unborn child, but not to such child's child.

Where a family estate has passed from father to the eldest son for generations, it has been done by fresh settlements of the land being made, usually upon marriage.

When a tenant in tail becomes twenty-one he can disentail the estate, *i.e.* turn it into an estate in fee simple, but if there is a life tenant he must get his consent.

(C). An Estate in Fee Simple

The largest estate in land.

An estate in fee simple is the largest estate which can be held in land.

It is an estate given to a man "*and his heirs.*" Where such is the case *all* his heirs may inherit, but by the old law of primogeniture, if he dies possessed of the land, and has not otherwise directed by his will, it is the eldest son who takes the estate.[1]

All relatives sprung from a common ancestor may inherit.

Not only direct descendants but collateral blood relations, and all relations who have sprung from a common ancestor, may inherit, the eldest in equal degree (*i.e.* relationship) being preferred to the younger, and males to females.

Illustration.

> Suppose A, who is himself owner of land in fee simple, wishes to sell it to, say, John Brown. He conveys it to "John Brown and his heirs," and John Brown then has an estate in fee simple.[2]

By this transaction A conveys away all his estate in the land and John Brown gets it.

But, as we have said, the heirs of John Brown, though mentioned, get nothing by the conveyance. John Brown can sell the land the next day and spend the money. The words "his heirs" only show what estate he is to get, not what the heirs are to get.

[1] This is the same with an estate in tail male.

[2] If A conveys to *John Brown and the heirs of his body*, John Brown has of course got an estate in tail, but A has not parted with the whole of his interest in the land. He has what is called his "*reversion.*" See p. 93.

A fee simple is only an *estate.*

Still it must never be forgotten that an estate in fee simple is only *an estate,* and, in the improbable event of the owner dying without heirs of any kind, and not having made a will, it escheats to the original grantor—now the King.

Power over it practically unlimited.

Subject to this the owner's power over such an estate is almost unlimited.

To curtail an old legal rhyme :—

> "He need fear neither wind nor weather,
> For 'tis his, and his heirs for ever."

He may cultivate the land how he pleases, open mines, commit waste of the land, or use it in any other way, so long as he does no injury to neighbours.

Since 1290 may sell it.

Ever since the Statute *Quia Emptores* (1290) he has been allowed to sell the land or any part of it, and since the abolition of Knight's Service and conversion of land into free and common socage in 1660, to leave it to anyone he chooses by his will.

May carve out of it lesser interests.

Being, so far as the law allows anyone to be, the absolute owner, he can carve out of his estate smaller interests in his land and grant them to others.

Thus, of course, he can make leases for years, but these are only chattel interests in the land, no matter for how many years they are to exist.

The reversion.

He can do more. Having the largest freehold estate he can carve out of it smaller *freehold* estates. Thus he can sell an estate for life, or even an estate in tail, and he has still something left called his reversion (see *post* p. 93).

Proper words to convey estate in fee simple.

To convey an estate in fee simple to A the proper words to be used are to "A and his heirs." Until so recently as 1881 no other words would do. Even if land was conveyed by deed to A "*for ever*" this only gave him a life estate. Now if in a deed the words "*in fee simple*" are used this is sufficient.

Latitude allowed in a will.

In a will any words which clearly showed the intention to give an estate in fee simple are sufficient.

A simple gift of the land itself by will passes all the interest in the land which the testator (the maker of the will) had.

Joint-tenants and Tenants in Common

Land may be given or conveyed to two or more persons *as joint-owners*. They are regarded in law as one person.

Any freehold estate may be held by joint-owners. The peculiarity of this ownership is that if one joint owner dies the others succeed to his share in the land.

Land may also be given to two or more persons as tenants in common. Here again they possess the land together, but unlike joint tenants, each has a distinct and separate title to his share.

Whether lands are held in joint tenancy or tenancy in common, the owners can partition them, or have them partitioned between them, so that each may have his separate part of the land.

Mortgages.

Mortgage of lands in fee.

If an owner in fee simple mortgages his estate he conveys the estate to the *mortgagee and his heirs*. The mortgagee is then tenant in fee simple of the land, subject to having to reconvey the land when the mortgage money is repaid.

After an owner has mortgaged his freehold land he is no longer legal owner, but he has a right to get it back on paying off the mortgage. This is known as his "*equity of redemption*" (see *ante* p. 19) and this equity of redemption he can mortgage again or sell—though the second mortgagee cannot get the freehold of the land.

An Estate in Reversion

An estate in reversion.

If a man grants to another a lesser interest in his land than he himself possesses, he has a reversion.

His reversion is the right to have the land back again when the lesser interest comes to an end.

Example.

Take the simplest case : A, the owner in fee, grants to B an estate for life in the lands. Here A has not parted with all his right to the land for he is owner in fee simple, but he is not in possession for B is in possession for his life. When B dies the land will revert to A, and this is called "A's reversion"—or his estate in reversion.

If you take a part from the whole a part remains.

A reversion then is the right left in the person who grants a lesser estate out of a larger one.

The particular estate.

The lesser estate is called the "particular estate" (*i.e.* a part or *particula* of the larger one) and the grantor's right to have the land back when the particular estate is ended, his "reversion."

A reversion may be assigned by deed.

No reversion on grant of fee estate.

It follows from what we have said that there cannot be a reversion on a grant in fee simple. The owner has parted with all he can possibly have.

There can be a reversion on an estate tail, for the owner in fee simple who carves such an estate out of his own has not parted with all he has.

An Estate in Remainder

An estate in remainder.

An estate in remainder is an estate to take effect and be enjoyed after the natural termination of another estate granted by the same conveyance. (Blackstone.)

This sounds technical. An example will make it clear.

Example.

> A, the owner in fee simple, grants his land to B for life, and after B's death to C and his heirs. Here C has a remainder in fee simple after B's death; but it is a future estate in expectancy and the two estates, *i.e.* those to B and C, have been granted by A by the same conveyance.

Any number of estates may be created, though nothing can follow a grant in fee simple.

A, the owner in fee simple, may grant to B for life, then to C for life, then to D for life, then to E in tail, and then to F in fee simple. B gets his life estate at once. All the others have to wait until the ending of the estates which come before theirs. They are all said to have "*estates in remainder.*"

> *Note.*
>
> Even in the olden time delivery of the seisin would not have been made to each of the holders of the estates above mentioned. It was sufficient that it was made to the first.

Remainders Vested or Contingent

Once again. Remainders are either vested or contingent. A vested remainder is one which is always ready to vest, as soon as the particular estate ends. Remainders are vested or contingent.

Example.

To A " for life " afterwards to " B and his heirs." Assuming B to be a living person he and his heirs are always ready to inherit the moment A dies. B is therefore said to have a *vested* remainder. Vested remainder.

A contingent remainder is a remainder to an unascertained person, or to a person on the happening of an event which may never take place.

Example.

To A for life, remainder to " B's eldest son (then unborn) and his heirs " ; or to A for life, remainder to B if he should survive A. Both of these are remainders, and they are both *contingent* remainders.

If the remainder was not ready to vest the moment the particular estate came to an end it failed, but by recent legislation it has been largely protected. Contingent remainder.

The subject of contingent remainders is a very large and difficult one, but cannot further be considered.

We greatly fear we are getting too technical, if not wearisome, but one thing more must be told about the interests in lands.

We have spoken of the rule of law that forbade the creation of any estate after an estate in fee simple had been granted. This was quite logical. If the seisin had been delivered to a man and his heirs, to give another estate after this would have been to take such man's estate in fee simple away from him. This was not allowed. Executory interests.

The lawyers, however, have been able to effect even this. They held, after the Statute of Uses (see *ante* p. 79) that this could be done by what was called a " *springing or shifting use.*" A " springing or shifting use."

It was decided that where the estate was vested by the operation of the statute, though in fee simple the statutory estate could " spring " from one person and his heirs to another person and his heirs.

Example.

Example.

Land is conveyed to "A and his heirs" to the use of "B and his heirs." The statute turns this *use* into an estate in fee simple in "B and his heirs." A is called simply the *conduit pipe* to carry on the estate to "B and his heirs." But "B and his heirs," though they have an estate in fee simple, *have got it through the statute.*

It is a *statutory* estate in fee, and such an estate the lawyers decided could jump from one person to another, though given in fee. Consequently in the example above given the land *after* it has been given to "B and his heirs" may be given to "C and his heirs"—two estates in fee simple following one another—or to "B and his heirs" till the happening of some event, and then to "C and his heirs." This is called "*a springing or shifting use.*"

Executory devise.

The same thing may be done by will, in which case it is spoken of as an "*executory devise.*"

Executory devises are even more intricate than contingent remainders. Their incidents and peculiarities cannot be dealt with.

Summing up.

Now to sum up shortly what has been said about the estates or interests in land.

It has been shown that the three great freehold estates in possession are: the estate for life—the estate in tail—and the estate in fee simple.

The estate for life is the oldest, but the smallest freehold estate, but yet larger than any leasehold interest in the land.

The life estate of the husband in his wife's lands called "Curtesy" and the wife's life estate in one-third of her husband's lands called "Dower" have been explained, and it has been shown that *at the present day neither husband nor wife has any absolute right to this interest in the lands of the other.*

Summing up.

An estate in tail, or to a man *and* "*the heirs of his body,*" is next dealt with. The history of this estate, the attempt to stop its alienation by the Statute *De Donis* and the way the lawyers evaded this, have been dealt with.

The position of the tenant in tail in the present day, and the manner in which estates are kept entailed in a family concludes the consideration of the estate in tail.

Then we passed to consider the estate in fee simple—the largest estate any person can hold—the estate being to him " and his heirs " descendants or collateral heirs.

We have shown how he can sell it, or give it away by will, or sell or give away lesser interests than he himself possesses, in which case he keeps the reversion.

The difference between " joint tenants " and " tenants in common " has been dealt with.

Future estates, being estates in reversion and remainder have been shortly explained, and we have stated that an estate in remainder may be either vested or contingent.

Finally, we have tried to show the way in which, by making use of the Statute of Uses, or by will, even an estate in fee simple may be made to pass away from one person and his heirs, to another person and his heirs.

CHAPTER IX

OF LEASEHOLD AND COPYHOLD INTERESTS IN LAND AND SOME MISCELLANEOUS MATTERS CONCERNING LAND

" *Attempt the end and never stand to doubt,*
Nothing's so hard but search will find it out." MERRICK

YET one more chapter relating to the law of land, and it shall be the last.

Chattels, real.

In addition to the freehold estates and interests in land described in the last chapter, there are certain chattel interests in land, sometimes called estates, but more properly " chattels real."

LEASES

The most important of these are leases.

Leases.

The person who lets on lease is called the " lessor " ; the person who takes the lease is called the " lessee."

It has been more than once previously said that leases are not real property at all. They are personal property.

Less than freeholds.

No matter for how many years a lessee may be entitled to his lease of the land, twenty-one years, or ninety-nine years or more, *he has got no freehold in the land*, but something less than a freehold.

If he should get a freehold interest in the land, it swallows up his lease.

Must have fixed time for ending.

Leases for terms of years may be made for any number of years, but there must be a fixed time for them to end or they are not leases. If no time is agreed for the lease to expire the law says it is a tenancy at will merely—not a tenancy for years.

A very common description of lease is for seven, fourteen, or twenty-one years, at the option of the lessee.

May be assigned or underlet.

A tenant may assign his lease, *i.e.* part with it to another person, or underlet the land, unless he has agreed not to do so.

The grantor of a lease is often called the "landlord," and the lessee the "tenant," but the words mean the same as "lessor" and "lessee," for strictly, no matter for how short a time the letting is, the tenant is a lessee for years.

The owner of a lease could leave his interest in the lease by his will, long before the freeholder could leave his estate by will.

Personal property.

Leases devolve, like all personal property, to the executor or administrator (see *post* p. 109) and not direct to the person to whom they are given, as is the case with freeholds.[1]

Short lease may be made by word of of mouth.

A lease—if it does not exceed three years—may be made by parol, that is by words, if two-thirds at least of full improved rent is reserved.

Now if it exceeds three years, or two-thirds of full rent is *not* reserved, it must be made by deed.

Leases must now be assigned by deed.

Agreements in leases called "covenants."

The lease itself generally sets out the conditions on which it is made, and the mutual promises of the lessor and lessee. These promises in a deed are called "Covenants" *e.g.* the lessee *covenants* to pay the rent—to keep the premises in repair—to farm the land properly, etc., and the landlord *covenants* that the tenant shall quietly enjoy the premises, etc.

If the letting is only for a year, or from year to year, the tenant is still called a tenant for years.

Letting from year to year.

Every letting of land at an annual rent, where no time is fixed for its ending, is in law *a letting from year to year*, but it may be shown, though no time is named, that it was intended to last for even a shorter period, as for instance three months, or a month, or even a week. The manner and times at which the rent is paid is of importance in deciding this question. A letting of a cottage for no fixed time, but where the rent is paid monthly, is generally held to be a monthly letting—if paid weekly, a weekly letting.

[1] Even freeholds, whether given by will or not, now pass in the first instance to the executor or administrator to enable him to pay the testator's debts; but he only holds them for the persons to whom they are given, or for the heir. This is really a matter of convenience.

Notice to Quit

Notice to quit.

If the time for the ending of the tenancy is fixed between the parties, and the tenant gives up the land or premises at the end of this time, no notice to quit is necessary.

Example.

If A has a lease for three years and intends to give up the premises at the end of this time he need give no notice. It is the same if he has a tenancy for one year certain, or even for one month, or one week.

If no time is named he is *prima facie* a tenant from year to year. In such a case the landlord is entitled to *six* months' notice, and the tenant must receive from the landlord *six* months' notice.

Notice must expire at time tenancy began.

There is one thing with reference to this six months' notice which *must never be forgotten.* It is not six months' notice given at any time which will suffice. It must be six months' notice *to expire at the time the tenancy began.*

Example.

A is a tenant from year to year. If he wishes to quit at the end of the first year of tenancy he must give six months' notice on or before the end of six months from the time the tenancy begins. If he lets this time pass, he cannot get rid of the tenancy before two years have expired, for the next notice he can give is one to expire at the end of the second year of the tenancy. The landlord must give him the like notices.

Note.

If the tenancy should be construed as a monthly or weekly one, a month's notice, or a week's notice is sufficient, but this should be given to expire on the same day of the month, or the same day of the week as that on which the tenancy commenced.

All the foregoing assumes the absence of agreement between the parties. They may agree to any notice they please, or to no notice at all.

Holding over.

A person has no legal right to remain in possession of land or premises after the tenancy has come to an end. If he does so he is called a tenant at sufferance.

If he has had a lease, and the lease has expired, and the lessor subsequently receives rent from him, a tenancy from year to year is created between them, and henceforth such a lessee holds as tenant from year to year—*on the terms of the lease* so far as they can be reasonably applied to a yearly holding.

Agricultural tenancies.

If the tenancy is an agricultural one, *i.e.* wholly agricultural or pastoral, or both, or a *market garden*, the tenant is now generally entitled to receive, and must give, a year's notice, where in ordinary cases half a year's notice would be necessary.

Such a tenant is also entitled to receive compensation for improvements under various Agricultural Holdings Acts.[1]

Repairs.

When the letting is by lease, the lease itself generally sets out what repairs are to be executed by the tenant and what by the landlord. In the absence of any agreement neither landlord nor tenant is bound to do repairs, except that it has been said that a tenant from year to year is bound to keep the premises "wind and water tight," but even this is doubtful.

No implied warrant that a house is fit for habitation.

The landlord is never bound to repair unless he has agreed to do so. The law is that if a dwelling-house is let the landlord does not even impliedly agree that it is fit for habitation.

Except a furnished house or workman's dwelling.

This is *different in the case of a house let furnished*, and also in the case of certain small houses let to the working classes.

Estates in Copyhold Land

Estates in copyholds.

It has more than once been stated that copyhold lands are not freeholds. They were formerly held by the *villeins* attached to a manor.

May be same as in freeholds.

The various estates which may be held in copyhold land depends largely on the customs of the particular manor to which they belong. It is sufficient to say here that the copyholder may have customary estates similar

[1] At Common law a tenant is entitled sometimes to receive compensation for growing crops called "*emblements*," so called from "*embladare*," to sow with wheat. Even a tenant *at will*, who can leave the land at any time or be turned out without notice, is entitled to "emblements."

to those of freehold land, *i.e.* for life, in tail, or in fee simple. They are only customary for the freehold is in the lord, and strictly they are all estates at his will.[1] If the heir succeeds it is not necessarily the heir who would succeed to freeholds, but the person who is the heir *by the custom of the manor.*

Tenant in tail of copyholds.

The tenant in tail can disentail now by simple conveyance by deed of surrender to the lord.

Surrender of copyholds.

As stated, all copyholds are conveyed by surrender to the lord, and admittance of the new tenant or purchaser. The surrender is generally made by the presentation of *a rod* by the surrendering tenant to the steward of the manor.

The copyholder may freely alienate his land during his life. He may leave it by his will, in the same manner as his freeholds.

If he dies without doing one or the other, it descends according to the custom of the manor.

Mortgage of Land

Mortgage of land.

The greater part of the land in England is mortgaged.

It is a little startling to hear that the majority of persons who live on what they call their own lands, and enjoy them, are *not* the owners of these lands.

A mortgage is the making over land for money advanced, on condition that the land shall be restored when the money is repaid.

The person borrowing on his land is called the "mortgagor," and the person who lends the money is called the "mortgagee."

Land conveyed to mortgagee.

The land is actually conveyed to the mortgagee and *becomes his land in law* (see *ante* p. 93). If the mortgagor did not repay to the day he forfeited the land.

Rule in equity.

But Equity has long insisted that a mortgage is only a security for money, and that once a mortgage always a mortgage.

[1] The freehold of copyhold land being in the lord, he is entitled to all the mines and timber on the lands. In some places there are lands held by copy of Court-roll, but not expressed to be at "the will of the lord." These are called "customary freeholds," but the freehold of these is in the lord.

The mortgagor is usually left in the enjoyment of the land. If the mortgagee enters and takes it he must account for the whole profits.

Equity of redemption.

The mortgagor has what is called his "equity of redemption," *i.e.* right to get the land again, and he can only be deprived of this by the Court fixing a day for repayment, and the mortgagor failing to repay on this day.

Though the land in law is the mortgagee's, the mortgagor left in possession, can exercise many rights over it.

A mortgage debt is personal, not real property.

Copyhold lands and leaseholds may be mortgaged as well as freeholds.

Incorporeal Rights to or over Land

Incorporeal property.

We have spoken in the last few chapters of estates of which the owner has possession.

When a tenant has possession of his land he owns a real and tangible thing—in other words he is said to possess corporeal real property. It is corporeal for it can be touched, and to a certain extent handled.

There are, however, other kinds of rights in or over land, which are purely *rights*; cannot be touched or handled, and are therefore called "*incorporeal rights*," or incorporeal hereditaments.

It is not difficult to understand that a person may have a right to land or some right over it, without being at the time in possession of it.

Right to reversion or remainder.

The right to the reversion of land, or a remainder in it, are incorporeal, for though the person owning the reversion or remainder hopes some day to have the land itself, at present he only has a *right* to it at some future time.

Right of common, right of way, etc.

But there are other rights over land which are called *incorporeal*, such as rights of common, the right to pasture cattle on another's land, rights of way over another's land, etc.

All these are only *rights*. Sometimes they belong to a person because he owns some other land often near the land over which he has these rights.

Incorporeal rights pass with the land to the ownership of which they are attached.

If they are not attached to the land they pass by deed.

Title to Land by Undisturbed Possession

Title to land by long possession.

The possessor of land is *prima facie* the owner.

Even if he is not, the law will not interfere with him after he has had undisturbed possession for a number of years.

Twelve years' possession.

If since 1879 a person has had undisturbed possession of land *for twelve years*, and has not acknowledged in writing the right of some other person to it, he becomes the owner in law and the real owner cannot recover it from him.

Exceptions.

There are certain exceptions where the real owners are infants, married women, or persons of unsound mind. In these cases the time is extended, but thirty years is the maximum time even in these cases.

Estates in remainder and reversion are protected, and there are certain other rules which cannot here be considered.

CHAPTER X

CONCERNING PERSONAL PROPERTY

"Omnia bona mea porto mecum." CICERO

Personal property.

WE have now finished the consideration of the law of land, and turn to the other great branch of property, namely, Personal Property. This is not nearly so complicated a subject as that of land.

No estate in personal property.

There is no question of owning an *estate* in personal property as is the case with land. Personal property can be owned out and out, *i.e.* absolutely, by the person to whom it belongs.

Personal property is called *moveable*, to distinguish it from land which is immoveable.

Goods and chattels.

Personal things are often called "goods and chattels." We have said that leases are chattels. They are called "chattels real" because they are connected with the land, but, as several times before stated, they are personal property.

Example.

Let the schoolboy think of all the things that he or his family, if moving from one place to another, could take or carry with them—horses, carriages, clothes, motor-cars, jewellery, pictures, money, etc. They are all of them *moveables*, and all personal property.

Still the word "moveables" does not cover all personal property.

Personal property not in possession.

The schoolboy, or more probably his father, may have money in the bank, other people may owe him money, he may have invested in war loan, he may have shares in companies, and many other rights to property, all of which are personal property, but which property he does not carry about with him.

All these kinds of property are his, and are personal property, though generally in the hands of, and due to him from, other people.

What he has is the *right* to recover his property by action if improperly withheld from him.

Chose in action to recover personal property.

This right is called in law a "*chose in action*,"[1] *i.e.* *personal property not in possession*, for if it was it would be a "*chose in possession*," but for which the owner may bring an *action*.

A debt could not formerly be assigned to another person, so that such other person could sue for it, but now it may be, if assigned in writing.

Still, whether a person has his property in his own possession or someone else has it for him; whether he can carry it with him or only bring an action to recover it, unless it is real property, it can all be summed up in the description *personal property*.

How is personal property transferred?

Transferred in four ways.

The four principal ways in which personal property can be transferred from one person to another are the following: (*a*) By Gift, (*b*) By Deed, (*c*) By Sale, (*d*) By Will.

Gift.

(*a*) *By Gift.*—In this case the thing given must be handed over to the person to whom it is given or someone for him. It is the handing over which perfects the gift.

No writing is necessary. The handing over may be actual or constructive, as by delivering the key of a place where the goods are. If the person to whom the gift is to be made already has the article, *e.g.* if it has been lent to him, no second handing over is necessary.

Deed.

(*b*) *By Deed.*—If the transfer of personal property is made by means of a deed, no handing over of the property is required.

What is a deed?

Here it will be as well to explain what a deed is. It is a writing, setting out what the party or parties to it intend, but the writing must be *signed*, *sealed*, and *delivered*.[2]

Must be sealed and delivered.

Perhaps in old times, when few people could write, signing a deed was not necessary, but anyone could put his seal on a writing. It never was, and is not to-day, a "deed" if it is not sealed.

[1] "Chose," pronounced *shose*, means a thing.

[2] Called "*deed*" because it is a formal and solemn act done (*factum*).

The proper formality to observe after signing a deed is to seal it[1] and then placing a finger on the seal to say these words :

" *I deliver this as my act and deed.*"

The writing is thus declared to be *delivered* as the solemn act of the person making it.

A promise in a deed is called a " Covenant."

(*c*) *By Sale.*—The most usual way of transferring personal property is by sale. Sale.

There are, of course, two parties to a sale, one the seller, the other the purchaser.

Directly one party agrees to buy goods and the other agrees to sell them, *and the price is agreed*, the contract of sale is complete.

The goods from this moment belong to the purchaser, and the seller, if the money is not paid at the time, has only the right to recover it by action—*a chose in action.*

Generally sales of personal property can be made by word of mouth, and no writing is required, but a contract for goods, value £10 or more, cannot be enforced unless in writing—or the buyer has accepted and received part of the goods, or given something to bind the bargain, or in part payment. See *post* Chapter XIII, " Contracts required to be in writing."

(*d*) *By Will.*—All personal property can be left by Will. *See* next chapter, " Concerning Wills." Will.

Personal property, if not given away by will, does not go to the heir, as land does, but all the near relatives are deemed to have some right to share in it, and it is divided in the manner explained in the next chapter.

A person who finds personal property which has been lost has a right to keep it against everyone but the true owner.

A young sweep found a jewel in the road and took it into a jeweller's shop to ask its value. The jeweller said, " You young rascal, this jewel does not belong to you and I shall keep it." It was decided that the sweep had a right to recover it from the jeweller.

[1] On many deeds a wafer is now placed, which represents a seal.

CHAPTER XI

CONCERNING A WILL, AND CONCERNING INTESTACY

"Sign your will before you sup from home." SAMUEL JOHNSON

IT has often been stated that the law of England, following the Civil law, at one time permitted a boy of fourteen, or a girl of twelve years of age, to make a will of personal property.

Age at which will may be made.

This is not so now. No one under twenty-one years of age can make a valid will.[1]

This has been the law since 1837.

Every person, however, who attains the age of twenty-one can make a will, leaving his or her property, real and personal, as he or she chooses.

The person who makes a will is called the "testator," if a female, "testatrix." So a person who dies without making a will is said to die "intestate."

Formalities required.

Every will must be in writing and signed by the person making it and *witnessed by at least two witnesses.*

No special words are necessary even to transfer land.

Thus an estate tail can be given without the use of the words "heirs of the body," or an estate in fee simple without the use of the words "his heirs."

The intention always followed.

The courts in construing wills follow one general rule. They look to see if they can discover the intention of the person who made the will, whatever the words he used, and they are guided by this, and this only.

So long as the intention, in whatever words expressed, can be gathered such intention must be carried out.

A will therefore in a sense is a comparatively easy thing to make. So long as the testator states in clear language what he wishes, and signs the will at the end, only one formality is required.

[1] Exception. Soldiers on service, and sailors at sea.

The witnesses.

This is with respect to the witnesses. There must be two, and they must see the testator sign his will, and sign as witnesses in the presence of the testator, and of one another.

The following is the attestation clause which should always be written at the end of a will and strictly followed :—

Attestation clause at end of will.

> " Signed by the said testator (or testatrix) as his last will and testament in the presence of us present at the same time, and who at his request in his presence and in the presence of one another have signed our names as witnesses."
>
> A B, *Witness.*
> C D, *Witness.*

Though the writer has said it is a comparatively easy thing to make a will, it must not be assumed for a moment that he advises anyone without legal training to make their own will. In hundreds of cases this has led to confusion, and great expense. Especially if any complicated estate in land is to be left, it is quite hopeless for a layman to understand the words and expressions which should be made use of.

Printed forms of wills are often sold, but they are very dangerous and should always be avoided.

The executor.

In every properly drawn will an " *executor* " is always named. The executor is the person to whom all the property goes at the moment of the testator's death. The executor is only a trustee, and he has to carry out the instructions contained in the will.

He sends the will up to Somerset House in London, pays the death duties, and receives back a copy of the will, which enables him to deal with all the property. This copy is called the " Probate " of the will.

Probate of a will.

If the testator should forget to put an executor in his will, some other person, generally a near relative, is appointed to carry out the instructions in the will.

He is called not " executor," but " administrator," and when appointed performs the same duties as the executor.

An executor, or administrator, is allowed a year in which to carry out his duties.

If anyone gets a legacy by will he cannot force the executor to pay it to him in less time than a year.

Everyone should make a will.

Everyone who has any property at all, or even a hope of obtaining property, should, as soon as twenty-one years is attained, have his or her will made. A will takes effect from the moment of death, and passes everything that belongs to the testator at that moment.

Intestacy.

If a person makes no will he is said to die *intestate.* No person of full age should die intestate, for although the law in such case divides his personal property fairly amongst his relatives, yet it must be borne in mind that if he leaves any land his heir takes it, *and* his share of the personal property as well.

Again, there is more trouble and expense in dealing with the property of an intestate than in obtaining probate of a will.

A witness can take no benefit.

Another thing with regard to a will must never be forgotten. A witness to a will *can never take any legacy given by the will.* The will remains good, but the legacy to the witness is bad. Remember if you are asked to be one of the witnesses to a will, that very fact shows that you are given nothing by the will.

A will can be revoked, *i.e.* rendered useless, in three ways:

Revocation of a will.

(1) By the testator destroying it with the intention of rendering it invalid.

(2) By a will of later date. It is the *latest* will made before death that alone is valid.

(3) By marriage.

Many people are not aware that marriage absolutely destroys the validity of their will made before marriage.

Whether it is a man or a woman who has made a will and afterwards marries, the will is of no more value than the paper on which it is written. A fresh will must in every case be made.

Note.

A codicil.

A codicil is an addition to a will either altering it or giving some new legacy.

It must in every case be signed and witnessed by two witnesses just as in the case of the will itself, and should have a similar attestation clause. (See *ante* p. 109).

As before stated the will itself used to convey the real property direct to the person to whom it was given, and the executor only had to deal with the personal property.

Now all property, real and personal, comes to the executor in the first instance, who has to carry out the directions contained in the will.

Where no Will

The question naturally arises: What happens if a person leaves no will, dies *intestate* as it is called ? Intestacy.

Then the property is distributed by law.

The heir takes the freehold lands, and the whole of them, to the exclusion of all other relatives, except possibly the widow's right to dower (see *ante* p. 87, and see *infra* (*a*)). The land.

It is sufficient here to say that the heir is the nearest male relative of the intestate, tracing first his descendants, then his ascendant, and finally his collateral male relatives.

All the personal property, after the debts are paid, is divided as follows :— The personal property, how divided.

(*a*) If the intestate leaves a wife, and the whole property real and personal is under £500, the wife takes it all. Wife takes first £500.

Note.

This is a small exception to the rule that the heir must take the whole of the land.

If it is over £500, the wife takes £500 and interest before anyone else gets anything.

But in both these cases the wife only gets this £500 if there are no children. If no children.

If the intestate leaves a child or children the widow takes one-third, the child or children the other two-thirds of the personal estate. Wife and children.

Note.

If a child dies before his parent and leaves children they succeed to such child's share between them.

If there should be no children the widow receives a half—the other half goes to the next of kin whoever they are. Widow.

Children. If no widow, the children take all equally between them.[1] the descendants of any children who may have died taking their parents' share between them.

Father. If there should be no widow and no children or descendants of children the father takes the whole.

Widow and father. If there should be only a widow and father, they take equally, subject of course to the widow's right to the first £500 above mentioned.

Mother, brothers, and sisters. If the father is dead, the mother, brothers, and sisters all take equally between them, subject to the same rule that if one of them died before the intestate leaving children, such children take their parents' share between them.

Brothers and sisters. If there is no mother, the brothers and sisters take equally, subject to the same rule.

Husband. A husband takes *the whole* of his wife's personal property, even what she was entitled to for her separate use.

There are other rules of succession for more involved relationship. The rules alluded to above govern the ordinary succession to personal property in the family.

[1] In distributing personal estate, the law gives no preference to males over females.

CHAPTER XII

OF CONTRACTS

"*Consensus facit legem.*" LAW MAXIM

THE writer has on several occasions asked schoolboys, and indeed others of more mature age, this question—What is a contract? The answer has generally been given in some such vague terms as this—"It is something in writing," or "It is buying and selling." Vague idea as to a contract.

The legal definition is—"An agreement between two or more persons to do, or not to do, a specified thing or specified things." Definition.

It is sometimes said, this "agreement" must be one which the law will compel the parties to carry out.

This is generally so, though there are a few exceptions.

Perhaps the most correct definition of a "contract" is—"An agreement between parties to do, or not to do, something which the law permits them to agree upon, and where any formality required by law is complied with." Fuller definition.

It is of the highest importance that everyone should know what a contract is, and, generally, what formalities are required to make a contract binding.

The making of contracts is the most common event in everyday life. If one goes into a shop and buys an article this is a contract of sale; if one agrees to buy a horse of another this is a contract. If one agrees to take a house of another, or if one agrees to let a farm to another, these are all contracts; if two persons agree to marry this is a contract. Making contracts an everyday event.

"Of the making of contracts there is no end."

Though an endless variety of contracts may be made, there are only three kinds of contracts known to the law. Three kinds of contracts only.

They are the following :—

1. Contracts of Record.
2. Specialty Contracts.
3. Simple Contracts.

We will explain each of these in its order.

1. Contracts of Record

A contract of record.

Although it seems contradictory to say so, a contract of record hardly answers the definition of a contract at all, for it is the judgment of a Court of Record pronounced in an action.

Contract of record is a contract formed by a judgment.

When judgment is given in an action, a contract is said to be formed that the person against whom the judgment is given will obey it. Such a person does not really agree to carry out the decision of the court. He generally thinks, if the decision is against him, that it is wrong, and the last thing he would wish to do is to obey it, if he could help it.

Everyone is presumed to contract to obey the law.

Yet as everyone is presumed to obey the law and the decisions of the courts, especially if he goes to law and takes his chance of success, such person is said to be bound by a contract of record.[1]

Why called record.

It is called record because the court which pronounced the decision *records* all its proceedings.

A contract of record is called the highest form of contract.[2]

Contract of record cannot be impugned,

A person who has a judgment given against him is stopped from saying the judgment is wrong, or impugning its validity in any way, except upon the ground that it was obtained by fraud.

except for fraud.

Every contract, if obtained by fraud, can be set aside.

II. Specialty Contracts

Specialty contract is a contract by deed.

Specialty Contracts are contracts made by a *deed.*

We have explained before (*ante* p. 106) that a deed is a writing, not only signed, but sealed and delivered.

[1] Pronounced Re*cord.*

[2] There are two other contracts of Record—"cognovits," and "recognisances," which need not be here considered.

A deed made by one party is called a "deed poll," if made by two or more parties it is called an "indenture."

Indenture.

Deeds were an early form of making contracts before writing became general. People who could not write affixed their seal. Then if both parties sealed the deed it was cut through the middle in a wavy line, and one part given to each party. That is why it is called an indenture.

Deeds made between two parties are not cut through the middle now, but they are cut with a wavy line at the top of the deed.

Deed Poll.

A deed poll is cut straight, or "polled" at the top.

Parchment is generally used for important deeds because not so easily torn.

A deed needs no consideration.

The great difference between a Specialty Contract, *i.e.* a contract by deed, and a simple contract is this—the Specialty Contract requires no consideration, whereas every simple contract must have a consideration.

The meaning of "consideration" is explained below.

III. Simple Contracts

Simple contracts.

The most important contracts, because by far the most usual, are simple contracts.

Every contract which is not a contract of record, or made by a deed, is a simple contract.

Whether it is made in writing, or whether it is made simply by word of mouth, it is still a simple contract.

First requisite of contract.

The first requisite of a simple contract is that the parties are agreed as to what they are contracting about. There must be the assent of both parties to the same thing. If one intends one thing and another another thing, they are not *ad idem*, as it is called, *i.e.* their minds are not directed to the same thing.

Must mean the same thing.

Examples.

A contracts to sell B his horse. A means his brown horse, but B thinks he means his black horse. Here there is *no contract* at all, for the two parties are not *ad idem*.

A schoolboy contracts to sell his cricket bat to another boy for 10s. The seller means his second

bat, but the other really thinks he is buying the best bat. No contract again, and for the same reason.

Must be "consideration."

There must be *consideration* in every simple contract, otherwise it is not a contract at all.

Consideration—what is?

A "consideration" means that something of value must be given by the party who claims the benefit of the contract.

The law never enforces a promise to do or to give something, unless something of value is given for that promise, or unless the promise is made by a deed, in which case it needs no consideration (see *supra*). The law does not trouble itself about the *value* of the consideration, so long as it is of some value; but, if there is no consideration at all, it is called a "*nudum pactum*," *i.e.* a bare agreement which is not enforceable at law.

Nudum pactum not enforceable.

The distinction between contracts with a consideration, and agreements without consideration, will be seen from the following illustrations:—

Examples.

(1) A promises B in writing to make him a present of his horse. The law will not compel him to do it, as there is no consideration, therefore it is not a contract.

(2) A promises B *by a deed* to give him his horse. This is a contract because the promise is by deed, and a deed, as above stated, needs no consideration.

(3) A promises a clergyman to give him £100 towards rebuilding his church. No contract again, for no consideration.

(4) A promises B £5 if he will walk into the next street and fetch a parcel for him. This is an enforceable contract, for though the consideration for the promise, viz. walking into the next street, is a very small matter, still it is something done in exchange for the £5.

(5) The owners of a carbolic soap offer £100 to anyone who, having held one of their carbolic soap-balls to his nose for an hour, was not cured of influenza. This is a contract and was actually enforced against the persons making the offer. The consideration was, holding the carbolic ball for an hour to the nose.

(6) A promises B, a lady, that if she will marry him he will give her £50,000. If she marries him, this is a valid contract, for marriage is a valuable consideration for the promise of any sum of money.

(7) A father promises his boy at school £50 if he will abstain from smoking till he reaches eighteen. This is a good contract, the consideration being the abstention from smoking.

It would be different if the boy, as in Mr Anstey's story, "*Vice Versa*," sent his father to school and made him a similar promise, not because this would not be a contract, but for a reason explained later when we come to deal with the contracts of infants.

One last illustration :—

(8) A promises B if he will give him £5 he (A) will give him £100. This is rather a peculiar case: it is a contract and there is consideration, and, as we have said before, the law does not generally regard the value of the consideration. The rule is, however, that money can only be a consideration for an equal amount of money. In other words, £5 is a consideration for £5, but in this case the promise to give the remaining £95 is a promise *without* consideration.

Object of illustrations.

We have given all the above illustrations in the hope of making perfectly clear the meaning of the "consideration" which must exist in every simple contract.

Still a few more words about "consideration," for consideration is the very essence of a simple contract.

Past consideration generally useless.

A *past* consideration is generally of no use. It is often no consideration at all for a promise.

Example.

In consideration that you (A) *have* walked into the next street and fetched a parcel for me, I promise to give you £5. (Compare with illustration "4" *supra*.)

Here the consideration was performed *before* the promise was made, and it was not done at the request of the person promising the £5. The £5 in this case cannot be recovered, for the consideration was a *past* consideration.

The case would of course be entirely different if A had walked to the next street for the parcel, owing to the promise of the £5.

Exceptions.

Exceptions.

There are two exceptions to this rule.

(1) If A says to B I have paid your tailor's bill for you, please repay me, B is not bound to do so, but if A and B are both responsible to the tailor, and A *has been compelled by law to pay*, the law assumes he paid it, or at all events B's share of it, at his request, and he can recover from B his share.

(2) If A pays B's tailor's bill, though he was not asked to pay it, and B afterwards expressly promises to repay him, the law will assume that A paid it at B's request, and the promise to repay is binding.

Contracts permitted by law alone enforced.

Turning back to the definition of Contract on p. 113 it will be seen that it includes the words " which the law permits them to agree upon."

The question may be asked, does not the law permit the parties to a contract to agree upon what they like ? The answer is generally, Yes. In some cases, No.

The law will never enforce any agreement to do what the law forbids.

Agreement to commit crime.

Thus an agreement to commit any crime is absolutely unenforceable.

Example.

(1) A agrees to give B £10 if he will assault C. If B does assault C he cannot recover the £10.

(2) Two thieves agree to share the stolen property. Neither can recover his share from the other.

Immoral contracts not enforced.

A contract which is immoral stands on the same footing as a contract which is illegal.

Money won, or due, on gambling transactions cannot be recovered.

Example.

A makes a bet with B on a horse race. A cannot recover from B, as the law considers all gambling and betting to be against the best interests of the State.

Contracts in restraint of trade.

Again, it is in the best interests of the State that everyone should be at liberty to work where he chooses, and at what he chooses.

A contract which unreasonably interferes with this right is said to be "in restraint of trade" and will not be enforced.

Partial restraint of trade.

If such a contract is only in partial restraint of trade, it is good if there is valuable consideration for it, and the restraint is reasonable.

One illustration will suffice.

> A contracts with B to teach him a trade, and it is part of the contract that B, after he has learned the trade, shall not carry it on within five hundred miles of the place where A carries on his trade. This condition would probably be held to be unenforceable as being in restraint of trade, but if the condition was not to carry on the trade in the same town in which A carried it on, this would probably be held to be a good condition.

Restraint a question of fact.

Each case depends on its own facts. Sometimes the restraint may extend over a considerable distance and yet be a reasonable restraint. Sometimes it is reasonable that it should only last for a few years; in other cases it may last for the whole life of the party restrained.

Implied promise.

If one person requests another to do something for him, then, unless it is clear that it is a mere friendly act, the law nearly always implies a promise to remunerate the person who does it, and this though the remuneration is not fixed or even mentioned.

> *Example.*
> A says to B, "Come and work in my field." B does so. The law implies a promise to pay him a reasonable sum of money for this work.

Fraud

Misrepresentation.

We have said before that any contract can be set aside if it was brought about by the fraud or misrepresentation of one of the parties. Still it is not every misrepresentation that will make a contract bad.

Innocent misrepresentation.

An innocent misrepresentation made by one of the parties, though it induced the other party to make the

Fraudulent misrepresentation.

contract, does not invalidate the contract, but a deliberately false misrepresentation of some existing or past fact will do so.

Must be of existing or past fact.

It will be noticed we say "existing or past fact," for a statement of what may happen in the future is never a fact at all, but merely an opinion.

Example.

If A, when selling his horse to B, says, "The horse is sound and has never broken his knees," then (unless such representation amounts to a warranty, see *post*, p. 128) if A believes these statements to be true, the contract is good; but if he knows the horse is unsound or has broken his knees, this is a false representation and, if it induces B to buy the horse, the contract will be set aside. The same principle holds good if the representation or misrepresentation is made by an advertisement.

Contracts in writing.

Although most simple contracts of every day occurrence are made by word of mouth, or *parol* as it is called, many business men are in the habit of making their contracts in writing. The law, however, only requires a few contracts to be in writing, or attended with formalities.

What these contracts are will be stated in the next chapter.

CHAPTER XIII

OF CONTRACTS REQUIRED BY LAW TO BE IN WRITING

"Vox audita perit, litera scripta manet." W. CAXTON

THERE is no *class* of contracts known as contracts in writing.

An old Act of Parliament, passed in the reign of Charles II, and well known as the "Statute of Frauds," requires a few *simple* contracts to be in writing, or, at all events, to have some of the terms of the contract in writing.

The Statute of Frauds (29 Chas. II, chap. 3).

This statute was passed to prevent frauds, but it is often said that it has caused more frauds than it has prevented, by enabling persons to repudiate their just contracts because they are not in writing. The following are the contracts in the making of which writing *is* required :—

Five contracts required to be in writing.

I. A contract by an executor or administrator to answer damages out of his own estate.
II. A contract to be responsible for the debt, default, or miscarriage of another person.
III. A contract for which marriage is the consideration.
IV. A contract for the sale of lands, or interest in lands.
V. A contract that is not to be performed within one year from the time it was made.

What Statute of Frauds requires. Note or memorandum sufficient.

The statute then proceeds to say that no action shall be brought on any of the above contracts unless it is in writing, or a note or memorandum of it in writing, *signed by the party to be charged* or his agent lawfully authorised.

These concluding words must be carefully remembered. It will be seen the whole contract need not be in writing as long as a "note or memorandum" of it is in writing.

What note or memorandum should contain.

It is sufficient if the "note or memorandum" includes the names of the parties to the contract, the subject matter of the contract, and the consideration.

The consideration must always appear except in one case (see *post* p. 123).[1]

The contract need not be on one piece of paper, several papers, such as letters if referring to one another, are sufficient.

One party only need sign.

Again, it need not be signed by both parties, but by "the party to be charged." This means the party against whom the action is brought.

Example.

One person agrees to sell a field and another to buy it, but only the buyer signs the contract. He can be made to carry out the contract, but the seller cannot because he has not signed it.

(Of course it should be signed by both.)

Again, it need not be signed by the party himself. An agent will do if he has been authorized to sign.

The five cases above mentioned will now each be shortly considered.

To make executor or administrator liable.

I. Very little need be said about the promise of an executor or administrator to answer damages out of his own estate. It means, to pay something himself which was owing or due from the testator.

An executor is not expected to pay the testator's debts, and there is generally no reason he should.

It seems only right that if he is to be called upon to do so, his promise should be in writing and signed by him.

Of course there must be "consideration" for his promise, otherwise it is "*nudum pactum*" (see *ante* p. 116).

Guaranties.

II. The second description of contract that must be in writing is a guaranty—or, as the statute calls it, "a promise to answer for the debt, default, or miscarriage of another."

[1] When we speak hereafter of *contract*, under the Statute of Frauds, being required to be in writing, it must be understood that "a note or memorandum," as described above, is sufficient.

A "guaranty" is often in ordinary speech confused with a "warranty." They are entirely different things. What is a guaranty?

A guaranty is where a person promises that *if another person* does not pay what he owes, or perform some duty he is bound to perform, he will do it in place of such other person.

Examples.

A says to a tailor, "if you will make a suit of clothes for B and give him credit, then, *if he does not pay you*, I will"; or

A says to a banker, "if you will let B overdraw his bank account up to £100, if he does not repay you, and you call upon me to repay you any sum up to this amount, I will do so.

A says to a tailor, "if you will make a suit of clothes for B then I will pay you for them." This is not a guaranty at all, for B is never liable to pay. A himself is the only debtor.

In each of the above cases of guaranty A is called the guarantor. He is not the person primarily liable, for this is B. He only has to carry out his guaranty if B fails or neglects to do it. Guarantor never primarily liable.

If A has to pay, he can afterwards recover against B.

It therefore follows that every guaranty must be in writing. Must be in writing.

It is a simple contract (unless made by "deed") and of course must have "consideration," but this is the one case alluded to above in which the consideration need not appear in the writing.[1] It can be proved by word of mouth. Consideration need not be in writing.

The consideration for a guaranty generally consists in the giving of credit to the principal debtor. This is a valuable consideration.

III. The third description of contract required to be in writing, viz. a contract for which marriage is the consideration, does not mean *a contract to marry*, but some such contract as a father promising his daughter money if and when she marries. A contract in consideration of marriage.

IV. The fourth description of contract required to be in writing is of great practical importance. Contract to sell lands.

[1] This exception was made by an Act of Parliament in 1856, many years, of course, after the Statute of Frauds.

Not only must a contract for the sale of land be in writing, but a contract relating to any *interest* in land must also be in writing.

What is an interest in land ?

Numerous decisions exist showing what is an interest in land. It is sufficient to say that a contract for a lease or for a mortgage of land, or a contract to let furnished lodgings, or a house, or a contract for the letting of shooting over land, where the tenant has the game or a part of it, are all contracts for the sale of interests in lands.

Growing crops.

With regard to a contract for growing crops a peculiar distinction exists. If they are raised by labour and expense, as corn, potatoes, etc., they are *not* regarded as interests in land, but if they are the natural produce of the land from year to year as grass, or the fruit of fruit trees, they are so regarded.

Example.

A contracts to buy from B the grass growing on his ten-acre field. The contract must be in writing.

A contracts to buy from B the growing corn on his five-acre field. The contract need *not* be in writing.

Contract does not *convey* the lands.

A contract for the *sale* of land must not be confused with the formalities required to *convey* land, which have been explained in Chapter VII.

Though the Statute of Frauds declares that a contract for the sale of land to be binding must be in writing, the written contract does not *convey* the land, but only gives the parties to the contract a right to insist that it shall be conveyed from the one to the other.

The conveyance itself must now be by a "deed" (see *ante* p. 82).

Contracts which cannot be carried out in a year.

V. The fifth description of contract required to be in writing is one which is not to be entirely performed within a year from the time at which it is made.

This seems a curious distinction for the law to have drawn.

Why the law permits a contract for *one* year to be made by word of mouth, but if made for a year and one day it must be in writing, is hard to understand.

A contract not to be performed within one year means one which is impossible to be carried out in a year.

If it may be performed in a year, or may not be, then it is *not* within the statute, even though *in fact* it is not performed in a year.

One illustration will make this clear :—

Illustration.

A contracts to pay B the sum of ten shillings a week so long as B consents to keep A's child.

This contract need *not* be in writing, for though it *may* last for years it will not necessarily last even for one year, for B may give up the child any time he chooses.

Another contract which must be in writing.

There is another section of the Statute of Frauds (since re-enacted in another statute) even more important in practice than those already dealt with.

The statute says: No contract for the sale of goods, wares or merchandise shall be good if the price is £10 or more, unless the buyer shall accept and receive part of the goods, or give something in earnest or part payment, *or* unless some note or memorandum of the contract [1] is in writing, signed by the parties to be charged, or their agents lawfully authorized.

Meaning of clause.

The wording of this clause is rather involved. The principal thing to be remembered about it is that if you buy any articles for £10 or more, you must have the contract in writing, unless you take the goods at once, or part of them, or pay for them wholly or in part, or give something as an earnest to bind the bargain.

It does not matter whether the goods exist at the time of the contract, or have to be made ; the rule is the same in both cases.

Importance of this rule.

The writer has had experience of many cases where an action has been lost because people do not know that if they buy goods of £10 or more the contract should be in writing.

Some illustrations it is hoped will make this rule of law so clear that no reader of this book shall ever lose his action for such a reason.

Examples.

Examples.

(1) A agrees verbally with B to buy his motor-car for £200 and B agrees to sell it for this sum. If nothing more happens, this contract cannot be

[1] As to what is sufficient "note or memorandum," see *ante* p. 122.

enforced. A cannot insist on having the car, and B cannot make A take it.

(2) A agrees verbally with B to buy his motor-car for £200 and pays him £50 on account. The contract is a good one, for there has been part payment.

(3) A agrees verbally with B to buy a cart from him for £20 which he, B, is to make. No contract, because no writing.

(4) A agrees verbally with B to buy £15 worth of potatoes from him, to be delivered two sacks every week. No contract at first, but if A accepts the first two sacks the contract becomes good, for he has accepted and received part of the goods.

(5) A by letter offers to buy of B twenty tons of rice to be selected by B. B replies to the letter accepting A's offer. Perfectly good, for the contract is in writing.

(6) A verbally agrees with an artist to paint a picture for him for £500. No contract, because no writing.

"Accept and actually receive."

There are many decisions as to the meaning of the words "accept and actually receive" part of the goods, to deal with which would only encumber an elementary work such as this.

It is sufficient to observe that there may be acceptance of goods without physical acceptance, as for instance, if goods are selected in a shop and the shopkeeper is asked to put them aside for the purchaser. Or there may be physical receipt of goods without receipt in law, as where goods are ordered by sample there must be a reasonable opportunity of seeing if they comply with the sample after they are received. If the purchaser exercises acts of ownership over the goods, as by reselling them, he is generally held to have accepted the goods, though he may not have seen them.

Goods may be constructively delivered.

There may be constructive delivery of goods as by giving the key of the room or warehouse where they are stored.

Carrier.

Delivery of goods to a carrier, *named by the purchaser*, is equivalent to delivery to the purchaser himself, for he has made the carrier his agent; and generally, if it is arranged that goods are to be sent carriage forward,

i.e. the receiver is to pay carriage, the carrier is the agent for the receiver.

Contracts necessarily in writing.

There are other contracts which, though no Act of Parliament requires them to be in writing, are necessarily so.

Thus deeds are all written, as well as "sealed and delivered."

Negotiable instruments (which are explained in the next chapter) are necessarily in writing.

The Sale of Goods

Sale of goods generally.

Though it does not fall under the heading of this chapter, this seems the most convenient place in which to speak of an ordinary contract for the sale of goods.

As a large part of the community are sellers of goods, and the whole of the community purchasers of goods, a knowledge of the essentials of a contract of sale of goods would seem to be indispensable to every one.

We have dealt above with the sale of goods of the value of £10 and upwards, where writing is required.

In the ordinary case no writing is required.

Contract complete as soon as price agreed.

The contract of sale is complete as soon as the price is agreed upon.

The legal consequences are important. The goods at once become the property of the purchaser, and all the seller has is a right of action to recover the price. Suppose the goods are not taken away but left with the seller and a fire breaks out and destroys them, the loss falls on the buyer, for they are his goods and he must still pay for them.

If a purchaser of goods finds he has made a bad bargain he must generally put up with it.

Caveat emptor, meaning of.

There is an elementary maxim of law expressed in the words *caveat emptor*, *i.e.* the purchaser must beware. If the purchaser has had an opportunity of seeing and examining his goods and has not discovered the defects that exist in them, this is his fault. He cannot repudiate his contract by saying, "Oh, I did not notice such and such things about the goods; if I had, I should not have bought them."

The answer is "*Caveat emptor.*"

Seller need not point out defects.

The seller of goods is not bound to point out defects in the goods he offers for sale, but he must not take active steps to hide the defects, for this is a fraud.

Very often the purchaser does not examine the goods. He tells the seller what goods he wants, and often the purpose for which he requires them.

It is a condition of every contract that the goods shall be of the description contracted for, though not necessarily of the quality required. If a different *description* of goods to these ordered is supplied, though quite innocently, the contract can be set aside.

Warranty

Very often a warranty is given on the sale of goods.

Warranty. What is ?

Now, what is a warranty ? We have explained (*ante* p. 123) what a guaranty is, and how it is often loosely confused with a warranty, though it is an absolutely different thing.

A warranty is a statement by the seller of goods with reference to the condition, capacity or quality of the goods, which he warrants to be true, and which if it should turn out *not* to be true, he will make compensation for.

Warranty a separate contract.

It is not the contract of sale itself, but a distinct and separate contract between the parties for which the contract of sale is the consideration.

It used to be thought that any important statement made by a seller of goods to the purchaser at or before the sale, which materially induced the purchaser to buy them, amounted to a warranty, but this was never really so.

The seller must intend to warrant, and the purchaser must enter into the contract relying upon the warranty.

Warranty may be truthfully made.

We have said that *deliberately false statements* made by the seller which cause the purchaser to buy, amount to fraud, and that a contract can always be set aside for fraud.

In the case of a warranty there need be no fraud at all.

The seller may believe what he warrants to be entirely true and may have very good reason for believing it,

but if he *warrants* and it turns out to be untrue, he is liable on his warranty.

Examples.

A says to B, "If you will buy my horse, *I warrant it perfectly sound.*" B consents to do so. If the horse turns out to be unsound A must pay damages. It is immaterial that he believed the horse to be sound. The warranty is broken. Examples.

It is not absolutely necessary that the word "warrant" should be used, though if it is there can be no mistake. Word "warrant" need not be used.

If A says to B, "You can safely buy my horse, I am quite sure it is perfectly sound," and B replies, "Well if you say that, I rely upon what you say." In this case a jury would probably hold that the horse was warranted sound, though the word "warrant" was not used.

A very common mistake is made by persons who buy goods with a warranty. They generally think that if the warranty turns out to be untrue in fact, they can return the goods to the seller. Purchaser cannot return the goods.

This is not so. They *must* keep the goods and sue for damages for breach of warranty, or, if they have not paid for the goods they can set off their damages against the price and thus pay less for the goods than the price agreed.

Sometimes the law implies a warranty, though no warranty in fact is given. Implied warranty.

Where goods are ordered by description there is an implied warranty that they are merchantable, or where an article is bought for a particular purpose of a maker or dealer in such articles, and it appears that the purchaser relied upon the seller's knowledge, there is an implied warranty that the article is reasonably fit for the purpose for which it was sold.

CHAPTER XIV

CONCERNING NEGOTIABLE INSTRUMENTS

"Oh, this learning, what a thing it is!" "Taming of the Shrew."

Negotiable instruments.

THE principal negotiable instruments are the following :—

A. Bills of Exchange.
B. Promissory Notes.
C. Cheques.

Before considering the above, the words "negotiable instrument" must be explained.

What is a negotiable instrument?

A writing which deals with property or money is often called in law an "instrument." For present purposes we may call an "instrument" a paper writing representing money.

By the word "negotiable" is meant that this paper, representing money, can be transferred from one person to another, so as to give such other person a right to recover the money represented by the paper.

As a rule if a person transfers or sells property to which he has no title, the purchaser gets no better right to the property than the seller had—which is no right at all.[1]

It makes no difference that the purchaser can say I bought it quite *bonâ fide*, and gave for it what it was worth.

The answer is, "it did not belong to the person who sold it to you."

A *bonâ fide* holder for value.

With negotiable instruments it is *the reverse of this*. Anyone taking a negotiable instrument *bonâ fide* and giving value for it is entitled to the money it represents,

[1] There are some exceptions, as where the sale is in an open market.

though the person who transferred it to him had *no right* to it.

This is the result of its being negotiable.

Example.

A goes into a shop with a Bill of Exchange or a cheque and says to the shopkeeper, "Will you give me cash for this bill or cheque?" or he may buy goods, and pay for them with the Bill of Exchange or the cheque. The tradesman sees the names signed on the bill or cheque, and knowing them to be rich and respectable persons—though he does not know A—gives money or goods in exchange for one of them.

Now let it be assumed that A stole the bill or cheque. This makes no difference to the tradesman. He says "I took it as a negotiable instrument and took it *bonâ fide*, and gave proper value for it." He can recover the money from the persons whose names are on the bill, or, in the case of the cheque, from the drawer of the cheque.

This is the meaning of an instrument being negotiable.

Another illustration of what is negotiable may perhaps make the meaning still plainer. Money is negotiable. A person who takes money *bonâ fide* and gives value for it, cannot be made to return the money to the true owner.

Another illustration of meaning of negotiable.

Example.

A loses his purse containing a sovereign. It is found by B. B buys a pair of boots with the sovereign, and also sells the purse to a friend for 2s. 6d. A can recover the purse from the person who bought it, for B can give no title to it, but the sovereign he cannot recover for it is negotiable. Of course it is very difficult to identify a particular coin, but even supposing the coin was marked and could be identified, the result would be the same.

A Bill of Exchange is negotiable like a sovereign.

A. Bills of Exchange

A Bill of Exchange.

A Bill of Exchange is very generally in the following form :—

Form of.

London,
June 1*st*, 1919.

Three months after date pay to my order the sum of one hundred pounds value received.

£100 : 0 : 0

John Smith.

To William Jones,
Birmingham.

Accepted payable at Lloyds Bank at Birmingham.
William Jones.

This is a very simple form of a Bill of Exchange. John Smith is the "drawer" of the bill, and William Jones is called "drawee." As soon as William Jones writes across the bill that he accepts it (as above) he is called the "acceptor."

He is the person who has to pay the bill after the three months mentioned, *and three days*, have expired.

Three days' grace for payment.

The question will naturally be asked: Why three months *and three days* when the Bill says "three months"?

It is a very curious custom to allow "three days' grace" on all bills and promissory notes. How it originated is hard to discover, but it has for a long period been the custom of merchants to allow these three days, and the custom is now recognized as law.[1]

Discounting a Bill of Exchange.

After a Bill of Exchange in the above form has been *accepted*, it is generally what is called "discounted," in most cases by a bank.

If, when the bill becomes due, the bank cannot recover the money from William Jones they can make John Smith repay them.

The meaning of discounted is this: the bank gives the money for it *at once*, charging a certain rate of interest for doing so, and then the bank has to wait for the money until the three months and three days have expired.

Now see how useful Bills of Exchange are.

Uses of Bills of Exchange.

Let us assume (in the case of the above bill) that William Jones is a grocer, and has bought £100 worth

[1] Bills of Exchange are said to have been first used by Italian merchants.

of tea from John Smith. William Jones does not want to pay for it at once. He wants to sell it, or a great part of it, in order that he may have the money to pay for it. But let it also be assumed that John Smith wants to be paid the £100 at once.

By means of a Bill of Exchange each can get what he desires. William Jones says to John Smith, "Draw a bill on me, payable in three months, and I will accept it." John Smith does so in the form given above. It is then endorsed to a bank, discounted by the bank (see *supra*), and John Smith gets his money at once, though William Jones has not to pay it for three months and three days.

Another example of their use.

Take another instance to show the advantage of a negotiable instrument.

Until the year 1873 a debt due from one person to another was not assignable in law, but by means of a Bill of Exchange, what was in effect the same thing might be done.

Assume that A owes B the sum of £100 and B owes a like sum to C.

B has only to draw a Bill of Exchange on A, making C the payee of the Bill and the debt is in fact assigned.

The form of the bill in this case would be :—

Form.

Accepted payable at Lloyds Bank, Bristol. (*Signed*) A.

LONDON,

£100 : 0 : 0 *January* 1*st*, 1919.

Three months after date (*or* on demand) pay to C or his order the sum of One hundred pounds for value received.

To A. (*Signed*) B.

Use of bill in this form.

In this case A, after he has accepted the bill, by writing across it as above, has to pay C the £100 in three months and three days, but C may have endorsed it away to some one else. In this case A has to pay whoever may have had the bill endorsed to him.

This is only another description of Bill of Exchange.

In both illustrations the same formalities are required and the same results follow.

Bill must be in writing and stamped.

Every Bill of Exchange has to be written on a bill form It bears an *ad valorem* stamp according to the amount of the bill.

The *acceptor* has to pay the bill when due.

As before stated it is the *acceptor* who ought to pay the Bill of Exchange when it becomes due. If he neglects to do so, or becomes bankrupt, the holder of the bill can sue anyone whose name was on the bill before he took it.

Notice of dishonour.

If the acceptor does not pay the bill when presented for payment, notice must be given of this fact to all the other persons whose names are on the bill, whom the holder means to hold liable. It is not necessary to give notice of dishonour to the *acceptor* for, as he is the person who ought to pay, he knows whether or not he has done so, but if notice is not given at once to the other parties they are generally relieved from liability.

Value received.

Referring again to the wording of a Bill of Exchange it will be seen that the words "for value received" appear upon it.

The law always assumes that the acceptor, who has to pay the Bill of Exchange, has had *value* for it, and likewise also assumes that the person who holds the bill gave value for it.

Accommodation bills.

Bills of Exchange were originally meant always to be given in exchange for goods, but they were found to be useful to persons who wanted to borrow money, and, unfortunately, are a favourite form of security with moneylenders.

Note.

Moneylenders, warning against.

The mention of moneylenders induces the writer to warn his readers to avoid this class of man altogether. It is true the law now protects minors against the schemes of moneylenders, but boys reach manhood in so short a time after their schooldays are over, and, even at twenty-one are unversed in the ways of the world, and certainly quite unable to appreciate the subtle and ingenious devices by which, if they once resort to a moneylender, he retains them in his net.

Law can alter moneylenders' contracts.

If despite of warning a youth finds himself entangled in contracts with a moneylender he can now get relief from any "harsh and unconscionable bargain" [1] by applying to the court.

[1] Those are the words of the Moneylender's Act.

A bargain with a moneylender is almost the only case where the courts can alter a contract made between persons of full age.

To return to the subject of the chapter.

Meaning of Accommodation Bill.

Sometimes the acceptor of a Bill of Exchange has not received any value for it, but has simply lent his name to the drawer, in order that the drawer may, on the strength of the two names, get cash for the bill.

This is called an "Accommodation Bill." Even in this case it is the *acceptor* who is looked to to pay the bill when it becomes due, though if he does so he can make the drawer repay him.

It is useless for the acceptor to say he got none of the money, and only lent his name, and was told (as indeed he generally is) that he would not have to pay it.

If the person who owns the bill at the time it becomes payable has taken it *bonâ fide* and given value for it, he is, as before stated, entitled to sue everybody whose name appears on the bill.

Bill may be endorsed by several persons.

Sometimes a Bill of Exchange is endorsed by several persons in succession, each writing his name on the back of the bill and so transferring it from one person to another. The more names there are on the back of the bill the safer the bill is, for they are all liable to pay the holder. He can sue one or all, and whoever pays the bill can sue any person who endorsed it before he did, so that at last it comes back to the acceptor, who of course can sue no one, unless the bill is an Accommodation Bill, in which case we have said he can sue and recover the money from the drawer.[1]

B. Promissory Notes

Promissory Note.

Very little need be said about "Promissory Notes."

Like a Bill of Exchange a Promissory Note is negotiable.

A Promissory Note is really only a promise in writing by one person to pay another a sum of money on demand, or so many months after date, or to pay it to such person's

[1] We have only described the most ordinary form of a trade Bill of Exchange. There are other forms of bills, such as bills payable "on demand," "at sight," or "to bearer," which it is not necessary to deal with. Neither have we described the rights which arise if a bill is drawn on a person who refuses to accept it.

order, *i.e.* to any person to whom the owner endorses it in writing.

The following is the usual form of a Promissory Note :—

LONDON,
January, 1*st* 1919.

£100 : 0 : 0

Form of Promissory Note.

Three months after date (*or* on demand) I promise to pay C D or order the sum of one hundred pounds.
(*Signed*) A B.

Here A B is the drawer, and C D the payee. If C D likes to endorse it to some one else, the drawer will have to pay it to such other person.

The drawer has to pay it.

A Promissory Note can be endorsed from one person to another, just the same as a Bill of Exchange. The drawer has to pay it in the end, in the same way that the acceptor has to pay a Bill of Exchange.

Most of the remarks we have made about Bills of Exchange apply equally to Promissory Notes.

BANK NOTES

A bank note.

Bank notes are a special kind of Promissory Note. They are in reality Promissory Notes made by bankers. They are negotiable.

Fifty years or so ago many banks in England used to issue their own notes. Now very few do so. The reason is that no bank which carries on business in London or within a certain distance of London—except the Bank of England—may issue notes. Most of the large banks now carry on business in London.[1]

Bank notes are payable to the bearer.

This is an important privilege given to the Bank of England.

Bank notes are always payable to the bearer of the note on demand at the bank. They are generally treated as cash, and pass from hand to hand as such.

There is no special time within which they need be presented to the bank for payment.

If a Bank of England note is looked at it will be seen that it is a promise by the chief cashier of the Bank of

[1] The £1 and 10s notes which are now in circulation are issued by the Treasury for the Government. They are negotiable.

England to pay to the *bearer* on demand the sum of £5 or £10 as the case may be.

C. Cheques

A Cheque is yet another sort of negotiable instrument. Every schoolboy has seen a cheque. Many have doubtless received them. Some few are fortunate enough to possess banking accounts, and are thus able to draw their own cheques. A cheque.

A cheque is an order to a banker, given by a person who has money with the banker, to pay it out, or a part of it, to someone else. Definition of a cheque.

Very few private bankers now exist in England. Banks are nearly all joint-stock companies. They are called " bankers," or banking companies.

The form of a cheque is so well known it is not necessary to give an example of it.

The person who draws the cheque is the " drawer," and the person who is to receive the money is the " payee." The drawer and the payee.

A cheque is made out to the payee " *or bearer*," or to the payee " *or order.*" The difference is this : if it is to *bearer* anyone who *bears* the cheque to the bank can have the money. If it is made out to *order*, the payee must sign his name on the back of the cheque. Then anyone can take it to the bank and get the money. Cheque to "*bearer.*" Cheque to "*order.*"

All banking companies issue their own forms of cheques, and will supply cheques made out to " order " or cheques made out to " bearer."

It is always safer to have cheques made out to " order."

Cheques are often crossed, by two lines being drawn across the face of the cheque. What does this mean ? Crossed cheque.

It means that the bank on which it is drawn will not pay it to anyone *over their counter*. Whether the cheque is payable to bearer or to order, if it has two lines drawn across it, the banker will say, " I cannot pay you this, it must come to me through another banker." Meaning of.

Example.

A banks with Lloyds Banking Company at Eton, *i.e.* A has money with this bank at their Eton branch. He draws a cheque, say for £10, to B or Effect of crossing a cheque.

bearer. If he does *not* draw two lines across the cheque B can take it to the bank at Eton and at once receive the money. If he chooses to draw two lines across it B cannot go to the bank at Eton and get the money. He must take it to some other bank—no matter what bank—and ask this other bank to get the money for him from the bank at Eton.

Supposing A knows that B has a banking account with say the London County and Westminster Bank at Harrow. He crosses the cheque, or writes across it "London County and Westminster Bank, Harrow." In this case it must come to the Eton bank through this bank at Harrow.

The Eton bank cannot pay it to any other bank.

Crossing cheque a safeguard.

Crossing a cheque is some safeguard if the cheque should happen to get lost, but it is no great safeguard.

Suppose a person picks up a crossed cheque. Though he cannot take it to the bank and cash it, he can always take it to another bank and ask such other bank to get the money for him.

Crossing a cheque is a plan often used when it has to be sent by post.

Writing "Not negotiable" on cheque.

There is, however, a still safer plan when a cheque is to be sent by post, or there is any chance of its falling into the wrong hands.

Effect of the words.

This is to write at the top of the cheque the words "Not negotiable." By writing these words the cheque is changed from a negotiable instrument to one that is not negotiable.

This should always be done where a cheque is sent away by post.

Advantage of the words "Not negotiable."

See the advantage of it: the cheque is stolen, and some one in good faith cashes it for the thief. He cannot recover the money, as he would have been able to do, if the cheque had not had these two words "Not negotiable" written on it.

The writing of these two words on a cheque is allowed by statute. This is not generally known.

If a banker pays a forged cheque, *i.e.* where the drawer's name has been imitated by some other person, the banker loses the money, not the customer; and this no matter how cleverly the signature has been imitated. It is the banker's duty to pay out his customer's money on *his* signature, and not on that of any other person. Forged cheque.

He is supposed to know the signatures of his own customers, but as it is impossible that he can know everybody's signature—and the payee of a cheque may be anybody—he is not liable for paying where the signature of the payee is forged. Forged indorsement.

Example.

A gives a cheque for £10 to B or his order. B drops the cheque in the street. It is picked up by C, who writes B's name on the back and goes at once to A's bank and gets the £10. The bank does not lose the money. B loses it, for it was his cheque at the time it was lost.

A cheque should be cashed promptly, certainly on the day after it is received.

What is a Legal Payment?

A cheque or other negotiable instrument is not a legal payment unless the party to whom it is offered chooses to accept it as such. Legal payment.

Bank of England notes are a legal payment, and the creditor if they are offered to him must accept them as such. Bank of England notes.

It is the same with Treasury £1 and 10s. notes which are now so largely in circulation.

Silver is a legal payment up to £2, and copper up to 2s. Coin.

CHAPTER XV

OF THE RESPONSIBILITY OF A CUSTODIAN OF PROPERTY

"Ea sub oculis posita negligimus." PLINY

Custodian of property.

A PERSON cannot always have his property in his own custody.

We are speaking of personal property only.

Land, though it may be injured, cannot be lost or destroyed. Personal goods placed by the owner in the custody of another may be.

What is the responsibility incurred by a person who has the custody of another's goods ?

This depends upon the circumstances under which he received them.

"Bailor" and "bailee."

A person who deposits goods with another is called in law "a bailor"

The person who receives the goods into his custody is called "a bailee."

Everyone is obliged from time to time to entrust some part of his goods to the custody of a bailee.

If one sends goods by a carrier, the carrier is for the time the bailee of the goods. If one travels by train with luggage, the railway company is the bailee of the luggage. If one goes to an hotel or inn, the innkeeper is the bailee of the goods brought to the inn.

If one sends goods for repair to a tradesman, he becomes the bailee of such goods. If one stores furniture, the storekeeper is the bailee of the furniture.

Even if one should request his friend to take care of his watch, the friend is in law bailee of the watch.

Liability of a bailee.

If goods whilst in the custody of a bailee are destroyed, or lost, or injured, who has to bear the loss ?

As we have said, this depends on the circumstances under which the bailment is made.

Wilful act.

If a bailee or his servant injures or destroys the goods wilfully, of course he must pay for them. This does not often happen.

If a servant of the bailee negligently injures or loses the goods, the bailee must pay for the act of his servant.

When care used bailee not liable.

Now suppose the goods are destroyed or injured without any want of care on the part of the bailee, then as a rule the bailee is not responsible to the owner.

The law does not require a bailee to undertake absolutely that he will restore the property, and in the same condition that he received it. It only requires that he should use care in the custody of it.

When bailee is paid.

If the bailee is paid for the custody of goods, he must take all the care that a careful man would take of his own property.

This was called in the Civil law (see *ante* p. 8) the care of a "*bonus paterfamilias*"—or the care which the careful head of a family takes.

If, notwithstanding that he has done this, the goods are destroyed or damaged, the loss falls upon the owner.

Where bailee is not paid.

If the bailee is not paid directly or indirectly, but only takes care of the goods to oblige the owner, he must still use care, but not so much care.

It is sufficient if he takes the same amount of care that he does of his own goods. If you choose to entrust your goods to a careless man, who undertakes their custody gratuitously, the fault is your own.

Examples.

(1) The owner of a motor-car sends it to a garage and pays so much a week for its custody. Suppose the garage is burnt down and the car destroyed without any want of care on the part of the garage keeper, then the owner loses his car, and cannot make the garage keeper pay.

(2) The owner of a clock sends it to a clockmaker for repair. A thief enters the shop *which has been left unattended*, and steals the clock. The clockmaker has to pay for the clock, for it was negligent on his part to leave the shop unattended. He is not a gratuitous bailee, for he would be paid for the repair of the clock.

(3) A asks his friend B to oblige him by taking care of his bicycle. B puts it in an unlocked shed where he keeps his own bicycle. It is stolen. A cannot recover the value from B, for B was a gratuitous bailee, and took as much care of the bicycle as he did of his own.

Two special bailees.

Now we must notice two classes of bailees on whom the law places a peculiar burden, for it does not allow them to escape responsibility even where they have not been to blame.

These bailees are :—

(1) Common Carriers.
(2) Innkeepers.

Common Carriers

Common carriers.

A common carrier is one who holds himself out as a person who will carry for hire the goods of such as choose to employ him, from one fixed place to another.

In former times the owners of stage coaches were common carriers. Railway companies are common carriers.

Railway companies.

If a railway company carries goods, whether the goods travel alone, or with a passenger, they carry the goods as common carriers, and *must* pay the owner if they are destroyed, lost, or injured.[1]

They are only exempt if the goods are destroyed or injured by the act of God, *e.g.* lightning, or the King's enemies, *e.g.* the Germans during the late war.

It is no use a common carrier proving that he took every possible care of the goods. He really insures their safety, and must pay though the loss or injury was not his fault.

Note.

A railway company often makes a special contract with the sender of goods to carry them at the *owner's risk*, charging less than the usual carriage rate. This is quite lawful.

[1] They are not common carriers of *persons*, but only of goods. Carriers for hire were, it is said, held responsible for the loss of the goods, because otherwise they might easily conspire with thieves.

Special statutes also relieve railway companies from having to pay more than the sums fixed by the statutes for articles of especial value, unless the fact that they are of especial value is told to the railway company before the goods are despatched. Partial exemption by statute.

Innkeepers

An innkeeper is "a person who provides travellers with everything they require on their way"—generally rest and refreshment for themselves and the horse or other animal they bring to the inn. Innkeepers.

At common law the goods of the traveller are deemed to be in the custody of the innkeeper, and *he is liable if they are lost or injured.* Liable for guests' goods.

Like a common carrier he is excused by the act of God or the King's enemies.

He may also excuse himself if he proves that the guest preferred to, and in fact did take care of his own goods, or that it was the guests' own negligence which caused the loss or injury.

Unless he can prove one of these things he is liable.

Note.

By a special statute—"the Innkeeper's Act"—he is not now responsible for the guests' goods to a greater amount than £30 unless they are lost or injured by the wilful or negligent act of himself or his servants. Partial exemption by statute.

This Act does *not extend to a horse or carriage* or its gear. He is liable for these in any event.

If the goods, though over the value of £30, have been expressly deposited with the innkeeper for safe custody, he is liable whatever the value.

An innkeeper cannot claim the benefit of the Innkeeper's Act, unless he has a copy of what the Act says posted up in a conspicuous position in his inn.

This is always done. Everyone who enters an hotel or inn is accustomed to see this notice in the hall; sometimes in each room.

CHAPTER XVI

OF MARRIAGE. HUSBAND AND WIFE, AND CHILDREN

"Better a fortune in a wife than with a wife." OLD PROVERB

Contents of chapter.

IN this chapter we purpose dealing shortly with the law relating to marriage; the legal position and rights of husbands and wives; and the position of children—called in law "infants."

MARRIAGE

Marriage.

Startling as it may appear the law permits a boy to marry at fourteen years of age, a girl at twelve years of age.

This must be with the consent of the parents or guardians.

No clergyman or registrar will marry persons under the age of twenty-one without this consent. Above the age of twenty-one everyone is entitled to marry at his or her own free will.

It is a grave offence, and severely punished, to make any false declaration on marriage.

Bigamous marriage.

If a man goes through the form of marriage when he already has a wife living, he is guilty of the crime of bigamy. If, however, he has not heard of his wife for *seven years*, and reasonably believes her to be dead, and then marries again, this is not bigamy, though if it should turn out that the wife is not dead, the second marriage is null and void.

The law is the same with regard to a woman.

Marriage a contract.

Marriage is in law *a contract* entered into between a man and a woman, and, like all other contracts, it requires the full and free assent of both parties.

It is the only contract which the parties, being of full age, cannot rescind by mutual agreement. It is a

contract for life, though husband and wife may now agree to live apart, and the courts will uphold such an agreement.

The marriage can only be terminated by the death of one of the parties, or by divorce pronounced by the court.

Marriage gives to each of the parties to it certain legal rights, and subjects each of them to certain legal obligations or duties.

Position and Rights of a Husband

Position of wife formerly.

Following the Civil law (see p. 8) the wife used to be said to be in the power of her husband (*in manu* as it was called) or to be merged in him. After marriage she was scarcely considered a separate person by the law. Husband and wife were regarded as one person, and that person was *the husband*.

Old writers even said that her husband had a right to chastise her as he might a child, if he used a stick no thicker than his thumb. If she ran away from her husband the court held that he could follow her and take her back by force, and even imprison her to prevent her again escaping.

Present position of wife.

This is all altered. A comparatively recent decision of the Court of Appeal has declared that it never was a part of the law of England that a husband may chastise his wife, and that if he does so, he is guilty of an assault.

The same case also decided that if a wife runs away from her husband's house he cannot follow her and take her back by force.

With regard to the husband's rights to his wife's property the change has been equally great.

Former rules as to wife's property.

Formerly he took *all* his wife's personal property and *all* the rents and profits of her land. He could sell her leaseholds, and if anyone owed her money he could sue for it, and, when he recovered it, keep it himself. In fact he took everything, except that he did not take her land absolutely, but only the rents and profits of it. If he did not sell her leasehold lands they survived to her.

Husband and wife being accounted one person, neither could sue the other, nor contract with the other.

There was, however, one way in which property could be enjoyed by a married woman.

If given to trustees for her *separate use* the Courts of Equity would compel the trustees to give the income of it to her, and would not allow the husband to take it.

In exchange for all these rights which the husband got by marriage, he had to support his wife, and he became liable for her debts contracted before her marriage, and for her torts (wrongs) committed before her marriage.

Now see how completely this position is altered.

Present rules as to wife's property.

Since the year 1870 the pendulum may be said to have begun to swing in the opposite direction, and since 1883 it has swung completely over to the other side.

The present day is a bad time for fortune-hunters by means of marriage.

Present position of the husband.

Since 1883 it is not too much to say that a husband gets *no rights in his wife's property*, except of course what she chooses to give him.

Her real and personal property which she had at the time of her marriage belongs to her. All property which may come to her after marriage also belongs to her.

If she earns money in any way, or has debts owing to her, she alone is entitled to such money.

Wife may enter into contracts.

She may enter into any contract, and may sue or be sued on contracts or torts (see *post* p. 147) as though she were unmarried.

Her husband is now liable for her debts contracted and her torts committed before her marriage, only to the extent of the property he has received from his wife—now generally none.

He can still be sued, together with her, for her wrongful acts during marriage (see *post* p. 148) and may have to pay damages in respect of these torts as they are called. This seems rather hard, as he gets none of her property.

Estate by Curtesy still exists.

Of course he may still be entitled to his life estate in her lands as tenant by the Curtesy (see *ante* p. 87) and succeeds to her personal property as next of kin, if she does not make a will (see *ante* p. 112).

It may be a small, though very small, satisfaction to a fortune-hunter to learn that a wife with means must contribute to the support of her husband if he has to go to the workhouse !

Position and Rights of a Wife

Present rights of a wife.

The present position and rights of the wife can be largely gathered from what has been said as to the position and rights of the husband.

She occupies now a position of almost complete independence. As to her property, if she does not choose to settle it or part of it on her husband upon marriage, she has entire control of it.

Since 1870 if she has separate property she can be made to maintain her children. She is liable on her own contracts, and for her torts jointly with her husband.

If she enters into a contract she is presumed to contract as to her *separate* property, and such property is liable for any breach of her contract.

Dower still exists.

The only rights she has in her husband's property—apart from any marriage settlement he may make—is a right to *Dower* in his lands, and to her share of his personal property if he dies without a will, but he can always deprive her of these (see *ante* p. 87).

Rights as her husband's agent.

With regard to her right during the marriage to contract debts which her husband must pay, this entirely depends upon whether she has his authority to contract them.

As a husband is bound by law to support his wife, he must supply her with what is known as "necessaries." If he does not supply her with the necessaries of life, such as food, clothes, etc., the law assumes that she has his authority to pledge his credit for these things.

If he does supply her with necessaries, she has no authority to pledge his credit at all.

Note.

"Necessaries" have been defined as "something which it is reasonable she should enjoy." This must depend in part on her husband's rank and position. What may be a necessary for a peeress,

or the wife of a rich man, may not be a necessary for the wife of a man in a humbler position in life.

If a tradesman supplies a married woman with, say, extravagant articles of dress, her husband is not liable to pay for them, unless he authorised her to buy them, or has ratified such purchases, after he has become aware of them.

Husband may withdraw his authority.

Even though a wife has her husband's permission to pledge his credit, he can withdraw such permission at any time he chooses.

A married woman may now be made a bankrupt.

Guardian of her children.

Formerly a married woman had no right to the guardianship of her own infant children, even after their father's death.

Now she is by law their guardian, after their father's death, but the father may by will appoint a guardian to act with her.

Though, as we have said, a wife is responsible in damages for her wrongs (torts) and husband and wife can be together sued in respect of them, yet if she commits a crime when with her husband, she is generally held to have been compelled to do so by him, and is not punishable. This rule does not apply to crimes of a very serious kind, such as murder.

Neither a wife nor husband can be convicted of stealing goods belonging to the other whilst they are living together.

Infants

Infants.

It seems a misnomer, and by no means complimentary, to call a youth who may be "head boy" of his school, and is capable of making a hundred runs at Lords, "an infant." Yet such is his legal description. If under twenty-one years of age he is regarded by the law as "an infant."

This does not mean that he is never held accountable for his acts. If he violates the law, unless he is of very tender age, he can be punished as though he had attained majority.

Protection of his property.

It is mostly in regard to his property and ability to enter into contracts that the law regards his judgment as immature, and consequently surrounds him with safeguards.

It cannot be expected that a boy who has never had any experience of business, or business relationships, should be able to bargain on equal terms with men of business experience, some of whom are not too particular as to the means they adopt to secure an advantageous bargain. Still less can he be alive to the numerous snares spread in his way by unscrupulous persons who design for their own ends to encourage him in extravagance.

The usual temptations which beset a boy approaching manhood are to borrow money, or to get into debt with tradesmen for extravagant and often useless articles.

It is especially against such temptations that the law protects him.

Void and viodable contracts.

At common law the contracts of an infant are not absolutely void but voidable. This distinction between a void contract and a voidable one is a real distinction. If it is *void* there is no contract at all, but if only *voidable* at the infant's option, the effect is that he can hold the other party to the contract bound to him, whilst, if he chooses, he can repudiate the contract.

This at first sight does not appear quite fair, but it is one of the protections given him by law.

Ratification of infants' contracts.

At one time it was a very common practice when an infant had made a contract which was voidable, to induce him to ratify such contract when he became twenty-one years of age.

By *ratifying* is meant promising, generally for some new consideration (see *ante* p. 116) to be bound by the contract made during infancy.

Examples.

(1) An infant borrows £50 from a moneylender. He could of course repudiate this contract; but when he came of age the moneylender often said, "I will lend you another £50 if you will give me a promissory note payable in six months for £100 and interest," thus including the first £50.[1]

[1] Although we said (see *ante* p. 117) that money was only a *consideration* for money, to an equal amount, yet here the promissory note at six months' date would be a consideration for the whole £100, for it is something different from money.

(2) An infant buys jewellery from a jeweller. After he comes of age the jeweller supplies him with other jewellery on credit, on condition that he pays for the whole.

In both these examples there was a *new consideration* for the promise to pay after attaining twenty-one, and such contract was generally binding.

It will be seen that these were easy ways in which to make the debts of an infant, which were voidable, binding upon him after attaining full age.

It was determined to stop even this.

Infant Relief Act, 1874.

In 1874 "The Infant Relief Act" enacted that all contracts of infants for money lent or for goods supplied (except necessaries) which were, as has been stated, formerly voidable, *should be absolutely void*, and that this should be so whether the contract was made by deed, or was a simple contract.

The same statute enacts that an infant *cannot ratify any debt contracted during infancy*, on attaining full age, even if there is a new consideration for his promise to pay it.

Necessaries

Necessaries.

The one exception mentioned in the above statute is "necessaries."

An infant has always been held liable on a contract made for *necessaries*. In other words, if he buys necessaries he must pay for them.

Numerous cases have been decided by the courts as to what are "necessaries."

What are necessaries?

As in the case of a married woman (see *ante* p. 147) it is impossible to lay down a rule as to what are necessaries, so with an infant necessaries depends upon the position and means, or future prospects of the infant.

If an infant has considerable wealth, or the expectation of succeeding to large property, many things which would be accounted luxuries in one not so fortunately placed may be necessaries for him.

Food, clothing, and lodging, according to his position are always necessaries. Even attendance of male servants may be a necessary for a rich boy.

On the other hand, articles of mere luxury have never been accounted necessaries, or articles purely ornamental, though articles which are useful as well as being luxuries have sometimes been allowed. Luxuries not necessaries.

Money promised for charity, however meritorious the motive for giving it may be, cannot be treated as a necessary, for it is not for the infant's own benefit.

It will be readily seen from the above illustrations how difficult it is to say whether a particular thing is or is not a necessary for an infant. In every case the special circumstances of the infant's position must be carefully regarded.

It must be remembered that when we speak of an infant's contracts being voidable or void, we mean his executory contracts, that is, contracts which have *not* been carried out.

If the contract has been carried out and finished with —" executed " as it is called—then, except in the case of a sale of an expectancy—(see *post* p. 152) it is too late for the law to interfere, unless the contract was brought about by fraud. Executed contract.

Example.

An infant buys extravagant jewellery at an exorbitant price *and pays for it.* In the absence of fraud, this contract cannot be set aside, for it is executed.

An infant may sue in the courts, or, where he is liable, be sued, but this must always be through some third person, who is called the infants' " next friend," and who conducts the action on his behalf. May sue and be sued.

Protection of Infants from Moneylenders

So desirous is the law to protect infants from that notorious class of people called moneylenders, that since the year 1892 it has been a criminal offence to send any circular, or document, offering to lend money to any infant. Since 1900, in order that the moneylender may not escape the penalty by saying he was unaware that the person was an infant, he is liable to the penalty unless he proves that he had reasonable grounds for believing the infant to be of full age. Money-lenders.

Relief to Infant Selling his Expectancy

A person who has an *expectation* of succeeding to property in the future, but has not yet succeeded to it, is especially protected by the courts.

If he sells his expectation, *i.e.* his future right to the property, the court will set aside the contract if in the opinion of the court such contract is harsh and unfair to the seller though there has been no fraud. This principle applies with special force to a sale of his expectation by an infant.

Infants' Responsibility for Wrongs (Torts)

Liability for torts.

Though, as stated, the law protects infants from disadvantageous contracts, it does not give him any immunity in respect of his wrongs or torts.

In other words, an infant is liable, as though he were of full age, for any tort he may commit which causes injury to a third party (see Chapter XVIII).

The fact that he may have no means to satisfy the injury he has caused is immaterial.

It is a common, though mistaken idea, that the father of an infant of tender age is responsible for his wrongs. If the infant possesses no property the father cannot be made responsible.

Examples.

A child throws a stone and breaks a tradesman's window. He is liable for this, for it is a tort. His father is not liable.

A youth of twenty negligently runs over a lady in the public street with his motor bicycle. Negligence is a tort, and he is liable.

A youth of twenty assaults a person and causes him injury and consequent loss. Though he may be punished for this as a crime, it is still a tort, in respect of which he can be made to pay damages.

Tort arising from contract.

Notwithstanding this general liability for his torts, if the tort arises from a contract which is not binding upon the infant, and cannot be enforced without recognizing the contract, the infant is not liable for such tort. This sounds subtle. The following illustrations should make it clear.

Examples.

(1) An infant hires a horse, not a necessary, for his personal pleasure. He rides it negligently and injures it. Here, though he has committed a tort by riding the horse negligently, he cannot be held responsible without recognizing the contract, which is not binding upon him.

(2) An infant improperly takes a horse from a livery stable, having made no contract with the livery stable-keeper, and rides it negligently. In this case he is liable. This is an independent tort, and not arising out of a contract.

Summing up.

It may be sufficient to sum up the foregoing remarks by repeating that although an infant is not liable on his contracts, except for necessaries, he is liable for his torts.

Infants' Responsibility for Crime

Responsibility for crime.

As to what is a crime, see Chapter XVIII, "Crimes" (*post* p. 176).

Responsibility of an infant for crime depends almost entirely upon his age.

Under seven years of age.

Under seven years of age he is entirely irresponsible. He is really a baby, and in law is not capable of knowing right from wrong, or committing crime.

Between seven and fourteen years of age.

Between the ages of seven and fourteen he is presumed to be incapable of committing crime, but this presumption can be rebutted if it can be shown, not only that he knew he was doing wrong, but that he knew he was violating the law.

Note.

There is a case in the law books where an infant, ten years of age, was actually hung for the crime of murder, as he had shown great cleverness in concealing all traces of his crime.

This would not happen in the present day.

Over fourteen years of age.

When an infant has attained fourteen years of age he is as fully responsible for any crime he may commit as though he had attained full age.

CHAPTER XVII

CONCERNING MASTER AND SERVANT

"He that would govern others should first be master of himself." MASSINGER

Contract between master and servant.

ALTHOUGH the schoolboy does not make contracts with servants, he may have to do so before he attains his majority, and is almost certain to have to do so as soon as he marries.

The relation of master and servant carries with it duties and responsibilities on both sides, which, it is not too much to say, no one should be unacquainted with.

We will endeavour to state these in the simplest manner.

How made.

A contract with a servant may be made by word of mouth. No writing is required unless the engagement *must* last for more than a year, in which case writing is required (see *ante* p. 124).

Customs as to notice.

If no time is fixed, the engagement is *prima facie* a yearly one, but, in many cases, subject by custom to be put an end to by a reasonable notice.

For example there is a custom that a domestic servant can be dismissed by giving him, or her, a month's notice at any time, or a month's wages in lieu of notice.

Domestic servants' notice.

Domestic servants can claim nothing more than this. They cannot claim board wages if paid a month's wages instead of notice.

A domestic servant, and indeed all servants, must give the same notice to the master which they are entitled to receive from him.

Other servants' notice.

A menial servant employed on the estate, but not in the house (*intra mœnia*), and paid weekly, can generally be dismissed by a week's notice, or the payment of a week's wages.

Agricultural servants who work on farms are often

engaged for the full year, and cannot leave or be dismissed before the full year has expired.

Servants in a higher class as bailiffs, clerks, and others *ejusdem generis*, are generally given three months' notice.

In other cases even longer notice may be required.

These customary notices, of course, only arise when there is no express agreement between the parties as to the length of service.

Duty of a servant.

The servant has to obey the reasonable orders of the master, within the scope of the employment, but the servant is not bound to do what he or she has not contracted to do. For example, a cook is not bound to act as housemaid, nor a person employed simply as gardener to act as coachman.

In every contract of service the law implies a promise by the servant not only to obey orders, but that he or she has the ability and skill to perform the duties undertaken.

Dismissal without notice.

A servant who refuses to obey such reasonable orders can be dismissed without any notice at all, and cannot claim any wages, unless the wages are already due.

A servant guilty of dishonesty, or serious misconduct, is in the same position.

Note.

A person who contracts to do work for another, according to a contract which defines all the terms, and so long as the work is done by a fixed time can choose his own time for working, is not a servant but a contractor.

For example: A undertakes to build a wall for B for so much, the work to be completed in a month. A is not a servant, but a contractor.

Death of servant.

The death of a servant puts an end to the contract of service, but the death of the master does not, for his estate remains liable on the contract.

The Master's Responsibilities to his Servants

The master's responsibilities.

The master has to pay the servant's wages, and in the case of domestic servants supply reasonable food and accommodation according to arrangement.

If the servant is ill the master must still continue to pay the wages, unless he gives proper notice to end the contract, or the illness is of such a character as to render it highly improbable that the relationship between the two shall continue.

The master must insure his servant under the National Insurance Act.

Accidents to servants.

If the servant meets with an accident in the course of his employment, the master must, under the Workmen's Compensation Act, 1906, pay the servant half his or her earnings so long as the accident disables such servant from work, even though the disablement lasts for life.

When servant killed by accident.

If the servant is killed by accident arising out of the employment he must pay the relatives (if they depended entirely on the servant's earnings) three years' earnings not exceeding £300 and not less than £150.

If the relatives were not wholly dependent on the earnings, he must pay such sum as the arbitrator thinks just.

Even if there are no relatives at all, the master must, in case of death, pay the funeral expenses up to £10.

This serious liability imposed by the Workmen's Compensation Act on the master does not depend upon the master being to blame for the accident. Even if caused by the servant's carelessness the master must pay.

More than this, if the accident was caused by the servant's own serious and wilful misconduct he must pay, if it causes death, or serious and permanent disablement, though not in other cases.[1]

The servant must give notice of the accident and the claim must be made within six months of the accident, or where death results, within six months of the death.

Some diseases accidents.

Certain diseases mentioned in the Act are regarded as accidents. These are too technical to be mentioned here.

Every servant is reckoned a "workman" under the Act whose remuneration does not exceed £250 a year.

[1] This heavy liability under the Workmen's Compensation Act should always be insured against. The sums charged for insurance (especially for domestic servants) are not very large.

Servant injured by master.

Again, if a master by his own negligence or carelessness injures his servant, he can be sued by the servant for damages, but *not* if the servant claims under the Workmen's Compensation Act.

Note.

Certain classes of workmen, injured in the course of their employment, may sue the employer under the Employers' Liability Act, 1880, but not if they claim under the Workmen's Compensation Act. It is difficult to succeed under the Employers' Liability Act, for negligence has to be proved. Consequently it is now not often resorted to.

Master's Responsibility for his Servants

Master's liability for servants' wrongful acts.

If a servant whilst doing his master's work injures any person, the master generally has to pay compensation.

He incurs a like liability if his servant does injury to the property of anyone.

This responsibility is expressed by the Latin maxim, *Qui facit per alium facit per se*, which means that he who does a thing by another person is deemed by the law to have done it himself.

But the servant must be about the master's business at the time, otherwise the master is not responsible.

Test of master's liability.

The test always is—Was the servant at the time he caused the injury doing something which it was his duty as servant to do, or had he gone outside his duty, and was he at the time doing something for himself, or at all events not for his master?

Examples.

(1) A servant is driving his master's carriage to fetch him from a station and negligently runs over a child. The master is responsible, for though he may have warned the servant against driving negligently, the servant was driving on his master's business.

(2) A servant, during his master's absence, takes out his horse and carriage without his permission and negligently drives into another carriage and injures it. The master is *not* responsible, for the

servant was doing something which was no part of his duty.

(3) The drivers of two rival omnibuses, by racing one against the other, injure a foot-passenger. The owner of each omnibus is responsible, though he has strictly forbidden his driver to race. The drivers were doing their work, though doing it improperly.

(4) A servant, having driven his master to his business, on his return journey goes out of his way to give a lift to a friend. This is very near the line. Probably if he was only driving home a longer way than usual the master would be responsible, for it was the duty of the servant to drive the carriage home, but if he had made such a détour as could properly be called taking a separate journey to oblige his friend the master would escape liability.

Not liable for criminal act.

A master is not generally responsible for the act of his servant which is prompted by the personal malice or ill-feeling of the servant.

Example.

A bailiff, losing his temper with a person who comes to see him on the master's business, assaults and injures such person. The master is not responsible for the injury, for it was no part of the bailiff's duty as his servant to break the law.

Doctrine of common employment.

There was a peculiar exception to the common law rule that a master is responsible for his servant's negligence when engaged upon his work. If a servant injured *a fellow servant*, the master, being the employer of both, escaped all liability. The reason was that every servant was assumed to take the risk of being injured by his fellow servants.

Though this principle of law (called "the doctrine of common employment") still exists, its effect in practice is destroyed by the two statutes we have mentioned above, the Employers' Liability Act and the Workmen's Compensation Act.

Servant's own responsibility.

A servant who in the course of his work injures any other person, or injures property, by negligence, is, and always has been, himself liable to make compensation for the damage, quite apart from the question whether his master is liable or not. If the master is responsible,

master and servant can both be sued together, but the servant has generally no means wherewith to pay. Speaking strictly, the master who has had to pay for his servant's negligence can sue and recover what he has had to pay from his servant, but this is a right rarely resorted to.

When servant binds master by contract.

Although, as stated, a servant often makes his master responsible for his torts, he cannot, of course, bind him by a contract unless the master has authorized him to make such contract.

If he has so authorized him, he becomes the master's agent.

If a master has authorized a servant to buy goods from tradesmen in his name, he should be careful, when he withdraws such authority, to give immediate notice to such tradesmen, otherwise he may have to pay for goods subsequently ordered, if the tradesmen did not know the authority was taken away.

Wrongful Dismissal

Action for wrongful dismissal.

If a servant is dismissed without notice, or without proper notice, and there is no legal justification for such dismissal, the servant can sue his master and recover damages.

This action is called " an action for wrongful dismissal."

Even when this has occurred, the servant must do his best to obtain fresh employment.

Example.

If a servant who is entitled to three months' notice is dismissed without any notice, this does not entitle him to be idle for three months. He must at the trial prove that he has tried to obtain fresh work during the time.

If he has tried and failed, he is entitled to recover his three months' wages, or salary, as the case may be.

Servant dismissed under mistake.

A master, who has dismissed a servant without notice, thinking that he was justified in so doing, and afterwards finds out that the servant did not do the thing for which he dismissed him, may still set up as a defence to an action for wrongful dismissal, any other misconduct of

the servant, which would have justified him, if he had known of it at the time of the dismissal.

Giving a Character to a Servant

Servant's character.

No one is bound to give a servant a character to enable him or her to obtain a fresh situation.

Though this is the law, it is so customary for the former master or mistress to do so, that, except for good reason, there may be said to be a *moral* obligation not to refuse.

If a character is given, the only thing the law requires is that it should honestly express the opinion of the person giving it as to the character and qualifications of the servant.

Such person may be mistaken as to the servant's character and merits, and may even make untrue statements concerning them. The servant has no redress if the person giving the character acted *bonâ fide*, and really believed such statements to be true.

A privileged communication.

The reason for this is that a character given of a servant is what is called in law a "privileged communication" and though it may be false and libellous, and may injure the servant, no action brought in respect of the injury will succeed.

Example.

A former mistress writes to one who proposes engaging the servant that she believes him or her to have been dishonest when in her service. Though this is a libellous statement and turns out to be wrong, yet the communication is privileged and no damages can be recovered.

Where bad character given out of ill-will.

There are exceptions to most rules of law, and there is one exception to the rule that a character given respecting a servant is a privileged communication.

If the master or mistress giving the character is shown to have been prompted by *malice* or ill-will to the servant the privilege is gone, and the servant, if what is said is untrue and libellous, can recover damages.

The law says, " Malice destroys privilege."

Malice destroys privilege.

Example.

A master is annoyed at his servant leaving him, and in giving a character spitefully says that when in his service the servant was dishonest, knowing that this was not true. If an action is brought and the jury finds that this was said out of ill-will and is untrue, the master will have to pay damages.

The above would be quite an exceptional case, and the possibility of such an action should not deter anyone from giving their honest and true views of their servant's character, when called upon to do so.

CHAPTER XVIII

CONCERNING TORTS OR WRONGS

"Alas, how easily things go wrong." GEORGE MACDONALD

Torts are legal wrongs.

IN earlier parts of this book the word "torts" has been mentioned several times as meaning *wrongs*.

It now becomes necessary to consider these wrongs more carefully.

In Chapter V it was said that everyone has certain rights—personal rights, and rights of property—and that anyone else who interferes with these rights, without justification, commits a wrong for which an action can be brought against him and damages recovered.

Torts are quite distinct from contracts. Contracts arise from agreements between the parties themselves.

The duties not to interfere with the personal rights and rights of property of others are fixed by law, and quite independent of the will of the parties.

Tort, as such, not a crime.

Torts are different to criminal offences. A tort as such is not a crime. It is true that a particular act may enable the person injured by it to bring a civil action of tort for damages, or to prosecute for a crime, but these are quite different modes of redress, and the procedure is different.

We purpose in this chapter to deal only with torts which injure a person's safety or freedom, or his reputation, or property, and which give the person injured a right to recover damages from the wrongdoer.

Crimes are dealt with in the next chapter.

General principles relating to torts.

Before explaining separately the most usual torts for which actions are brought, a few words must be written with regard to the principles from which they arise, and the legal rules which govern them.

The general principle on which all legal wrongs are based is that one must not do unlawful harm to one's neighbour.

In different words it was expressed in the Civil law (see *ante* p. 8) by the maxims, "Injure no one" and "Give to everyone his due."

These principles form a part of every system of law in civilized states.

It is sometimes said that "for every wrong there is a remedy," but perhaps it is better to say, "for every infringement of a legal right, which is not justified or excused by law, there is a remedy."

Duty by moral law.

The duty to do no unlawful harm to one's neighbour is part of the moral law. Whether a particular act is a breach of the moral law in this respect would seem to depend largely upon whether or not it was committed wilfully, but this is not the test laid down by the law of England.

Intention immaterial.

Probably by far the greater number of torts for which actions for damages are brought in our courts were not committed wilfully. Often the last thing in the mind of a person who commits a tort is intention to do injury. Still he is liable for the injury he causes unless he has some good legal excuse.

To put the matter in the plainest words, if you injure the person or property of another, without legal justification or excuse, it is no answer to say you did not intend to do so.

Intention may increase damages.

In some few cases a deliberate and intentional wrong may aggravate, that is increase, the damages the wrongdoer may have to pay, but the *absence* of intention never prevents a person having to pay the full damages which the tort has occasioned.

Torts may arise from *omission* to do what it is one's legal duty to do, as well as from doing what it is one's legal duty not to do.

Torts of omission.

If the writer may speak from his own experience far more torts arise from omission than from commission. The numerous actions arising out of accidents to persons or property in the public streets, which are daily dealt with in the courts, are all founded on the omission to take care, usually on the part of the drivers of vehicles.

It has been several times repeated that a person is answerable for his torts or those of his servants engaged in his work, *unless he has legal justification or excuse.*

What is justification or excuse ?

The question naturally arises : What is legal justification or excuse ?

It is quite impossible in a book such as this to enumerate all the cases where the law justifies or excuses what would otherwise be a tort giving the person injured a right of action for damages.

A few illustrations only can be given.

(1) A person who injures another in self-defence is excused.

(2) The officers of the law who lawfully arrest or imprison a man are justified in interfering with his liberty : in fact, all acts done properly by judicial officers are protected.

(3) A person who in making a confidential report, which it is his legal duty to make, says, without malice, things injurious to the character of the person upon whom he reports. This person is justified though he injures the other's reputation.

(4) If, when giving a character, things injurious to the character of the servant are written honestly and without malice, such statements, even though libellous, are excused.

(5) A parent or schoolmaster gives moderate chastisement to a child or pupil. This is excusable, it may even be called justifiable.

(6) A, *without any negligence* or want of care, unfortunately injures B. This is sometimes called "inevitable accident." It is excusable, for the law does not require a person to exercise superhuman care, but only ordinary care.

(7) A person starts a new shop close to another of the same description and succeeds in taking all the custom away from the other shopkeeper. This is excusable as fair competition, which it is in the public interest to allow.

Again with regard to torts occasioned by the way a person deals with his own property.

Person dealing with own property.

It is not correct to say that "a person may do what he likes with his own," *nor* to say that "he must so use his own as not to injure anyone else."

The maxims are contradictory, and each contains elements of truth and of falsity.

In some cases you cannot do what you like with your own, and disregard the rights of others, and in some cases you may use your own in such a way as to injure others.

Acquired rights of other persons.

With respect to land these questions are often complicated by the fact that other people may have, or gradually acquire, rights which prevent the owner of land doing what other owners may perhaps lawfully do.

Once again the best way of making these legal principles clear is by examples.

Examples.

(1) A builds a wall at the extreme boundary of his land, and blocks up the light of B's windows. This he can do, for he is using his own property lawfully. But if B has had uninterrupted light from his windows for twenty years he has acquired, *by length of time*, a right to light, and if the wall materially interferes with it, A is liable to him for a tort committed against his right of property.

(2) A carries on upon his land an offensive trade, which inconveniences and injures the health of his neighbour. The neighbour can recover damages against him in an action of tort.

(3) A digs a well on his own land and by so doing dries up his neighbour's spring or well. Here, though he has injured his neighbour's property, he has done no legal wrong, for he is justified in so using his own property.

(4) A digs a trench on the extreme boundary of his own land and so deep that his neighbour's land falls in for want of support. This is a tort, for in law land is entitled to retain its natural lateral support.

The above illustrations, which show that there can be loss (*damnum*) without *legal* injury (*injuria*), could be amplified, but these must suffice.

To turn to another point.

It is sometimes said that a person cannot complain of a tort if it is committed with his consent, and that it then ceases to be a tort at all so far as he is concerned.

"*Volenti non fit injuria.*"

This principle of law is expressed by the maxim, "*Volenti non fit injuria*"—no injury is done to one who is willing it should be done to him.

This principle does not apply universally.

Trespass.

If a person puts his foot on the land of another he *primâ facie* commits the tort of trespass, but if he has the other's consent to come on his land he commits no tort at all.

It may be said that the principle generally applies to interference with or injury to property, or perhaps to personal liberty.

The writer is aware of a case where a distinguished judge, having caught some men stealing his property, gave them the choice of being prosecuted, or being imprisoned by him in his lock-up stable for three days on bread and water. They chose the latter alternative. If they had afterwards brought an action against him for false imprisonment, the only defence open to him would have been "*Volenti non fit injuria.*" Whether or not it would have succeeded is difficult to say.

Person cannot consent to bodily injury.

It is, however, clear law that a person cannot consent to *bodily* injury at the hands of another, unless the injury is inflicted with some beneficent design, *e.g.* by a surgeon.

A person cannot consent to let another assault him.

Assaults, unless justifiable, are against the King's peace (*contra pacem*).

Prize fights, or schoolboy fights are illegal, though each of the combatants agrees, and is willing to fight the other.

Injury in sports.

Boxing contests, fencing with weapons not likely to do serious injury, football matches, though they may cause serious bodily injuries are not illegal. They are regarded in law as friendly trials of skill, consequently any participator in such games, if accidentally injured *whilst the game was being fairly played*, cannot sue in tort. If he did, he would be met by the defence, "You were willing to incur the risk."

The same rule would probably hold good as to the spectators present at such games. They are in a sense participators, and an accident to one of them might be regarded as due to a risk voluntarily incurred.

Tort Causing Death

A personal action dies with the person.

We have now to call attention to a very strange principle of the common law of England.

Like so many principles of law it is expressed in a Latin maxim—"*Actio personalis moritur cum persona.*"

It means this—the right of action dies with the death of either the person committing a tort, or the person who suffers from the tort.

If the wrongdoer dies.

If A by negligence, or any other tort, injures B and dies before B can recover his damages, B's right to recover is gone. The fact that A left a large fortune and therefore that his estate was well able to pay damages is immaterial. The right to sue A dies with A.

If the sufferer dies.

The same general rule held good in the above illustration if B died from the injury but A survived. Although B was the sole support of his family, who were reduced to poverty by his death, they had no right to sue A who caused the death. B's right of action was a right personal to himself, and died when he died.

It was sometimes said that from a purely monetary point of view it was cheaper to kill a man than to injure him, and it certainly was.

Lord Campbell's Act.

In 1846 Lord Campbell succeeded in passing a statute, often called by his name, giving a right of action to the near relatives of a person killed by a tort, if such person could himself have sued, if death had not resulted from the injury.[1]

The other application of the rule still holds good, *i.e.* if a person who causes the personal injury dies, his estate is not liable.

Examples.

(1) A with his motor-car negligently runs over B. A dies the next day. B cannot recover damages.

(2) A with his motor-car negligently runs over B and kills him. B's relatives can, since Lord Campbell's Act, recover damages from A if they have suffered pecuniary loss by B's death.

[1] There are some old statutes, giving the executors of a person, whose *property* was injured, a right to sue for the injury.

Tort amounting to a felony.

Reference must be made to one other legal rule applicable to torts, before the more usual torts are dealt with separately.

It was formerly thought that if the tort amounted to the serious crime of felony, no action could be brought by the person who suffered it. The tort was said to be "merged in the felony."

Present rule as to.

This rule now only exists to this extent, that the wrongdoer must be *first* prosecuted for the felony and public justice thus satisfied, and then he may be sued for damages for the tort.

If an action is brought and it appears that the tort is a felony and that the wrongdoer has not been prosecuted, it is the duty of the judge to adjourn the action till this is done or some good legal reason for its omission is adduced.

Torts, for which Actions are often Brought

Assault.

Assaults.

An assault is strictly speaking an unlawful act which puts another in instant fear of bodily hurt. It need not be an actual striking—this is called a "battery," and more generally the two are spoken of together as "assault and battery."

Still, to threaten a person with violence, being in the position immediately to carry out the threat is an assault.

Examples.

Example.

A standing close to B shakes his fist in his face in anger, but does not touch him. *This is an assault.*

A, from an upper window, in anger points a loaded gun at B, standing below, but does not fire it. This is an assault, for A has it in his power to injure B at once.

A from an upper window shakes a stick in anger at B who is standing below. This is *not* an assault, for he is not in a position immediately to carry out his threat.

Assault and battery.

It is usually an assault coupled with a battery, where personal injury is caused by the battery, that forms the ground of an action for damages.

A battery includes an assault.

Every battery causing bodily injury is a tort, and gives the injured person a right to sue for damages.

If the injured person prosecutes the wrongdoer and punishes him, he may still sue for damages, *except in one case.*

Exception.

If the assault is not an aggravated one (see next chapter), but only a common assault, and the wrongdoer has been prosecuted, and the case has been dismissed, or the wrongdoer has suffered the penalty, he cannot afterwards be sued for damages.

In other words you cannot both sue and prosecute for a common assault.

False Imprisonment

Interference with liberty.

This is another tort infringing the right of liberty which every English citizen enjoys.

It was stated in Chapter V that the least imprisonment of a person against his will was an interference with his liberty.

To give the person imprisoned a right of action his freedom must be restrained in all directions, thus to prevent a man going one path if he may go another may be wrong, but it is not an imprisonment.

The most usual action for false imprisonment arises where a man has been arrested, not by a policeman, but by a private person on suspicion of a crime such as theft, or has been given in charge by a private person.

Risk of arresting on suspicion.

It cannot be too well known what a great risk is run by any person who takes upon himself to arrest another on suspicion. If he does so, he becomes liable to pay damages unless he can prove that a felony (see *post* p. 177) *has* been committed, and that he had reasonable cause to believe that the person he arrested was the guilty person. If it turns out that no felony has been committed, he has no legal defence to an action for false imprisonment.

A policeman can arrest on a *suspicion* that a felony has been committed. This is an important distinction.

Malicious Prosecution

Interference with liberty.

Malicious prosecution is another tort interfering with liberty.

To prosecute is to institute proceedings for the purpose of convicting a person of some crime before a court of justice.

It is often a duty to prosecute for crime, and the law protects anyone who does this honestly, but if under pretence of so acting, the person prosecuting is actuated by malice or ill-will against the person he prosecutes, the law cannot sanction this. A person who acts from such a motive is liable to be sued for malicious prosecution.

Of course if the prosecutor *knows* the person he prosecutes is not guilty, he deserves all he gets. This does not generally happen. The law requires, in this, as in so many other cases, reasonable care to be shown.

Action for malicious prosecution.

A plaintiff cannot succeed in recovering damages unless he proves, first that he was found not guilty of the charge, and also that there were no reasonable grounds for taking the proceedings against him, and then that the defendant was actuated by malice in what he did.

Malice.

Sometimes the absence of any reasonable grounds for prosecuting is evidence of malice, as a person ought not to prosecute another except on reasonable grounds.

It is for the judge at the trial of such an action to say whether or not there were reasonable grounds.

Libel and Slander

Injury to reputation.

How many persons know the difference between libel and slander ?

In common conversation when something is said not complimentary to the character of a person the retort is often made—" That's a libel."

In fact it is not. It is a slanderous statement, but if it is put into writing it becomes a libel.

The distinction then is that a libel must be in writing or print [1] whilst slander consists in words spoken.

Libel, what is ?

A libel is any statement in writing or print calculated to injure the character of the person about whom the

[1] A libel may even be by a picture or a sign.

statement is made, by holding him up to the hatred, contempt, or ridicule of the public.

The law assumes that an untrue libel must be injurious to reputation and entitle the person libelled to damages, but this is not always so with slander.

Libel is considered a graver offence than slander, though whether it is really more hurtful to society at large may well be doubted.

> "Slander whose whisper o'er the world's diameter
> Transports his poisoned shot." "Hamlet."

If libel is true.

Everyone has heard the saying—"The greater the truth the greater the libel." This is both incorrect and misleading.

The law has never allowed damages to be recovered in respect of a libel which is *true*. It may be a cruel thing to write of a man that he was convicted of crime in his boyhood, but if this is true, the man cannot recover damages.

The only foundation for the saying is this: Libel is a crime as well as a tort. If the libeller was prosecuted he could not escape conviction by proving that the libel was true. Now in some circumstances he may. (See next chapter.)

Must be published.

A libel to be actionable must be published, but not necessarily to the public at large. It is sufficient if it is sent to one person.

If it is only sent *to the person libelled*, this is not a publication.

Slander.

Before a person *slandered* can recover damages for the slander, he or she must prove that the slanderous words caused some pecuniary damage.

Where damage is assumed.

There are exceptions to this rule. To say that a person has committed a crime, or has some disease which would exclude him from society, or to charge a woman with immorality, is actionable without special damage being proved. These charges are so serious that the law gives damages whether or not they can be proved to have caused pecuniary injury.

Even in such cases as these the truth of the charge is an answer to the action.

Negligence

The tort of negligence.

By far the most usual actions of tort arise out of negligence.

If a person by negligence injures another, or injures his property, he must pay the loss he has occasioned.

Negligence is the legal term for carelessness.

It has been well defined as "the doing of that which a reasonable man would not do, or the omitting to do what a reasonable man would do" having regard to all the circumstances existing at the time.

Everyone must take reasonable care not to injure others.

Negligence a question of fact.

Negligence is a question of fact. There are numerous ways in which the omission to take care may cause injury either to person or property.

Everyone is responsible for his own negligence. He is also responsible for the negligence of his servants whilst doing his work (see *ante* p. 157).

Negligence in keeping animals.

A person may be responsible for injury done by animals belonging to him.

If anyone keeps a wild animal he does so at his peril, and must pay for any injury it causes.

With respect to tame animals—domesticated as they are called—it is not negligence to keep an animal of this description, unless the owner is aware that it is likely to do injury.

Liability for a dog.

Take the case of a dog. It is often said, "A dog may have its first bite," meaning that the owner is not responsible for the first bite of his dog.

This is not quite correct. If the owner had means of knowing the dog was vicious he is liable even for its first bite.

If the dog had never shown any viciousness before, he is not liable for its first bite, for he has done nothing negligent in keeping the dog.

Note.

By a recent statute every owner of a dog is liable for injury done by his dog to sheep and other animals. In such cases it is *not* necessary to show that he

knew the dog to be vicious or accustomed to pursue animals.

Negligent driving.

In the present days of motor traffic a great number of injuries are caused by negligent driving. Very often these injuries are due to the fact that both the person causing the injury, and the person who suffers it, have been careless.

Contributory negligence.

Where negligence exists on both sides, and the injury has been caused by the joint negligence, the rule is that the injured person *cannot succeed* in recovering damages.

He is then said to have been guilty of "*contributory negligence*" and must suffer all the loss which has resulted, though he was only partly to blame.

This seems a rather hard rule. Many persons might think it fairer if the loss was divided between the two, but the law says, "No—if you have been guilty of contributory negligence you are not entitled to compensation for the negligence of another."

What is contributory negligence?

Much has been written and many cases decided as to what is contributory negligence, and when it will deprive a plaintiff of what otherwise would be his right to succeed.

Very slight negligence is not enough. It must be one of the real causes—a proximate cause—of the occurrence.

Sometimes it is said that as between the two parties it must be the proximate cause of the accident.

It is always subject to this further rule that if the other party could have avoided the contributory negligence and does not do so, such contributory negligence will not avail him as a defence.

Examples.

Examples.

(1) A drunken man lies down in the middle of a public street. This is clearly negligence on his part; but if another man in broad daylight, when he has every opportunity of seeing him and avoiding him, negligently drives over him, he cannot successfully set up the defence of contributory negligence.[1]

[1] It was often said that this rule was limited to the case of one who was in a position to avoid an accident *after* becoming aware of the contributory negligence, but a recent decision makes it doubtful whether this is the true test.

(2) A man left his donkey with its legs tied in a public street. Another person, who might have avoided it, negligently drove over it and injured it. Such person had to pay for the injury, for he could have avoided the contributory negligence.

Torts to Property

Injury to property.

The rights of property have always been jealously guarded by the law of England.

Any interference with the rights of property is a tort for which an action can be brought.

A person interferes with property at his peril.

Any person who interferes with the property of another does so at his peril. It is no answer that he did not intend to do so, or thought he had a right to do so. It does not matter whether the property is real property or personal property. It is the person in possession of the property who can generally bring the action, though he may not be the owner.

Many torts affecting property.

We cannot here set out all the torts which may be committed against property, and can only just mention one or two of the most usual.

To eject a man from his land, or to take away any of his personal property, is a tort.

The person injured can take proceedings to recover the same, and for damages for his injury.

Trespass.

Trespass to land is a tort to property, no matter how trivial the trespass may be.

There are other torts such as "nuisance," "waste," etc., which cannot here be considered.

Injury to property, real or personal, by negligence is a tort.

Injunction

Remedy by injunction.

In many cases the law, when invoked, is not satisfied with giving an injured party a remedy in damages for a tort, but will prevent the wrongdoer from committing it or from continuing to commit it.

This is done by an order of the court called an "injunction."

Examples.

(1) A commences to build a wall on his land, which the court is satisfied will, when erected, interfere with B's ancient right to light from his windows. The court will order A to stop building, or even to pull down the wall. Examples.

(2) A has trespassed repeatedly on B's land, and threatens to do so again. The court will issue an injunction against him forbidding him to do so.

If an injunction is disobeyed this is contempt of court.

Most courts now have power to issue injunctions.

CHAPTER XIX

CONCERNING CRIME

"La crainte suit le crime, et c'est son châtiment." VOLTAIRE

Classes of crime.

Crimes are divided into three classes—

(1) Treasons.
(2) Felonies.
(3) Misdemeanours.

Crime, what is ?

A crime is an offence against the law of a public nature, and such as tends to the injury of the community.

A crime very often is an offence against an individual, doing that individual special harm, but may be regarded by law as of such evil tendency that it is considered an offence also against the public.

It has been already stated that when a wrongful act is both a serious crime and a tort, the crime had to be punished before the person injured by it could recover compensation. Even now the action has to be postponed.

Intention.

A crime generally involves some moral guilt, though it does not always involve intention. For example, one who by gross negligence kills another is guilty of the crime of manslaughter, though he did not intend to kill.

Everybody is supposed to intend what are the natural consequences of the act he commits.

On the other hand, the intention to commit a crime is not punishable unless the crime is actually committed, or some attempt or incitement is made towards it.

Intention alone not punishable.

The law cannot punish mere wicked intention which is not followed by some act.

Every person is presumed by law to be responsible for his acts until the contrary is proved.

Persons excused.

We have already referred to the irresponsibility of a child of very tender age (*ante* p. 153) and to the principle

which sometimes excuses a married woman, when she has been coerced by her husband (see *ante* p. 148).

Now no child under sixteen can be sentenced to death or to penal servitude, and no child under fourteen can be imprisoned.

In the case of a person *non compos mentis* the law is that such a person is responsible for a crime he may commit, if he has sufficient mental capacity to know at the time of committing it, that he was acting contrary to the law of the land.

Drunkenness is as a rule no excuse for crime. Drunkenness.

Now a few words as to each class of crime.

(1) Treasons

The offence of high treason consists in a breach of the allegiance which every subject owes to the Crown. High treason.

This duty of allegiance is due not only from natural born subjects of the Crown, but also from aliens residing in the King's dominions, and under his protection.

The most serious treason is to *compass or imagine* [1] the death of the King, or Queen, or the eldest son of the King, or to levy war against the King in his realm, or to give aid and comfort to the King's enemies in his realm or elsewhere.

Misprision of treason is the offence committed by any person who knows of, and conceals, treason. Misprision of treason.

No person can generally be convicted of high treason, or misprision of treason, except on the testimony of *two* lawful witnesses.

(2) Felonies

No rule can be laid down which will decide whether an offence is a felony or a misdemeanour.

Generally it may be said that the more serious crimes are felonies, the less serious crimes misdemeanours.

Formerly if a person was convicted of treason or felony he forfeited all his property to the Crown. This rule was abolished in 1870.

[1] Even to compass or plot the King's death is not enough to constitute treason without some overt act tending towards its accomplishment.

Murder

Murder.

The most serious felony is murder.

Murder is the crime of killing a person under the King's peace, *i.e.* entitled to the King's protection, with malice aforethought.

The gist of the crime of murder is the intention to kill.

Intention is necessary.

If there is no intention to kill it is almost impossible for the crime to be murder.

It is not necessary that there should be an intention to kill the particular person who was killed. If A, meaning to kill B, kills C by mistake he is guilty of murder.

Exception.

There is also a peculiar old rule that if a man is doing a felonious act, and in doing it kills a person, he is guilty of murder, though he did not intend to kill anyone, but this rule is rarely, if ever, acted upon in the present day.

Homicide *primâ facie* illegal.

Duelling is illegal in this country. If one man kills another in a duel, he is guilty of murder.

Every homicide is by English law presumed to be unlawful and malicious. If one person has occasioned the death of another, it is for him to show that the act was justifiable or excusable, and does not amount to murder.

Very serious provocation may reduce murder to manslaughter, but words, however gross and insulting, are not sufficient to do so.

The death must take place within a year and a day or the person causing it cannot be convicted of murder, or indeed even of manslaughter.

Manslaughter

Manslaughter.

This is also a felony. In consists in killing a person without legal justification, but *without* the intention of killing him.

This is the real difference between murder and manslaughter. In murder there is an intention to kill, in manslaughter there is no intention to kill.

Still manslaughter is a very serious offence, and, though it cannot be punished by death, may often merit very severe punishment.

Manslaughter is often caused by negligence or carelessness. Manslaughter through negligence.

There must be some blame attachable to an individual who kills another before he can be convicted even of manslaughter.

If a man is doing what he is legally justified in doing, and doing it in a proper manner, and in so doing causes death he is not guilty of any crime; but if he is doing what he has a right to do, but in an improper manner and causes death, he may be guilty of manslaughter.

Example.

A schoolmaster is giving moderate chastisement to a pupil, using an instrument proper for the purpose. If the pupil should die from the chastisement the schoolmaster is excused, but it would be different if the schoolmaster was using an improper instrument or the chastisement was not moderate. In such a case the schoolmaster might be found guilty of manslaughter.

Assaults

The most serious assaults are felonies. Lesser assaults are misdemeanours. Assaults which are felonies.

An assault with the intention of killing, though it does not kill, and an assault with the intention of doing grievous bodily harm, are both felonies.

They both depend on the intention of the person committing the crime, but, as has been before said, everyone is presumed to intend the ordinary and reasonable results of his acts.

Examples.

(1) If A standing close to B deliberately shoots at him with a loaded gun, it would be almost impossible for him to plead successfully that he did not intend to kill A.

(2) If A plunges a dagger into the body of B, he would probably not be believed by a jury if he said he did not intend to do grievous bodily harm to B.

All indecent assaults are offences against the law, and sometimes regarded as most serious offences, and severely punished. Indecent assaults.

It must always be remembered that a child, whether a male or a female, cannot consent to an indecent assault, therefore this fact if proved is no defence to the person who commits such an assault.

Larceny

Stealing.

Larceny is the technical word for stealing.

Larceny is a felony.

The definition of larceny or theft is, "taking and carrying away the personal property of another, with the intention of depriving the owner of the same."

Of course the object of a thief is usually to steal for his own profit, but this object is not essential to constitute larceny. If a man, bearing a grudge against another, takes his watch and throws it into a river, he is guilty of stealing the watch.

Must be an *animus furandi.*

There must, however, be an intention to steal. The intention to steal is called in law "*animus furandi.*"

If one schoolboy takes the watch of another and hides it from him for a time, meaning to play a trick on him, or even out of spite, this is not larceny, for there is no *animus furandi.*

There are one or two peculiarities about this crime of larceny which must be mentioned.

In the first place there were many things which the Common law said *could not be stolen.*

Certain things not subject to theft.

Of course land cannot be stolen, for it cannot be carried away. The common law went much further and held that things which savoured of the land, or were attached to the land, were not things which could be stolen—for they were not the subject of larceny.

It seems ridiculous to say that growing corn, or fruit on a tree, cannot be stolen because they are a part of the land, but this is the law, except where it has been altered by statute.

There appears more sense in holding that wild animals (*feræ naturæ*) are not capable of being stolen, for whilst they are wild and at large they belong to no one. This is still the law.

Even some domesticated animals were not the subjects of larceny. It required a special Act of Parliament before a person could be convicted of stealing a dog.

In every larceny there must be a taking and carrying away of the article stolen, otherwise the offence is an attempt to commit larceny. Even the removal of an article from the front to the back of a cart is a sufficient taking and carrying away. **Must be an asportation.**

A bailee, that is, a person with whom one had deposited a thing, could not at common law be convicted of stealing it, for it was in the first place handed to him voluntarily, so he did not take it and carry it away without the consent of the owner.

A bailee may now, by statute, be convicted of stealing the goods entrusted to him.

With regard to stealing lost property the law says that if the finder of such property *at the time he found it* reasonably believes that the owner can be found, and still resolves to keep it, he is guilty of theft, but if he reasonably thinks the owner cannot be found he is not guilty of theft in keeping it, even though he should afterwards hear to whom it belongs. **Stealing lost property.**

Burglary

Burglary is the crime of breaking and entering a dwelling-house *at night* with the intention of committing a felony. **Burglary.**

It is also burglary if, being lawfully in the house, a person commits a felony and then breaks out of the house.

" Night " means between nine o'clock in the evening and six o'clock in the morning.

There must be a breaking and entering. To enter by a usual way as by opening the front door, is not a burglary, but to push up a window and enter in that way is burglary, although nothing is broken. Burglary is a felony.

Housebreaking

Housebreaking is the same kind of offence as burglary, but committed in the daytime. **Housebreaking.**

Embezzlement

Embezzlement.

The crime of embezzlement can only be committed by *a clerk or servant*. It consists in receiving money or property for a master and embezzling it, that is, converting it to his own use.

It must be embezzled *before* it reaches the master's possession, either actual or constructive.

If a clerk receives £5 for his master and puts it in his own pocket, meaning to keep it, this is embezzlement, but if he puts it in his master's till, and then meaning to steal it takes it out again, this is larceny.

There are many other felonies, which cannot here be dealt with.

(3) Misdemeanours

Misdemeanours are crimes generally less serious than felonies, though some misdemeanours merit, and receive, serious punishment.

The less important kinds of assaults are misdemeanours.

Obtaining goods by false pretences.

Obtaining goods by any false pretence is a misdemeanour.

In this case the pretence must be of a past or present fact, and of course it must be untrue, and it must have induced the person deceived to part with the goods.

It need not always be a pretence made in words.

Fraud by conduct.

A man who dressed himself in a cap and gown and went into a tradesman's shop at Oxford and ordered goods, though he did not say he was an undergraduate of the University, was convicted of obtaining goods by false pretences.

Perjury.

Perjury is an important misdemeanour. It consists in wilfully swearing what is untrue, before a duly constituted court of justice.

Libel.

Libel, as before stated (*ante* p. 171), is a crime as well as a tort. It is a misdemeanour.

Formerly a libeller could be punished whether what he wrote and published was or was not true.

Now he is entitled to be acquitted if he proves that what he published was true, *and* that it was for the public

advantage that it should be known. He must prove both these things.

A person never forfeited his property when convicted only of misdemeanour.

Many misdemeanours are indictable, and many are dealt with summarily by magistrates.

Punishment of Crime

Former barbarous punishments.

About a hundred years ago crime was punished in England with terrible severity.

Our ancestors certainly did not know how "to let the punishment fit the crime."

The sentence on a traitor was that he hung by the neck, but *not* till he was dead, for he was cut down alive, his inside taken out and burnt before his face, his body quartered, and these parts placed at the King's disposal.

Quartering the body was not abolished till 1870.

Persons convicted of almost any felony were punished by death.

Death crimes.

The crimes of stealing from the person above the value of one shilling, or from a shop to the value of five shillings, or from a dwelling house to the value of forty shillings, were all punishable by death.

A soldier or sailor wandering in any part of the country without a pass was hanged, as was a person who fraudulently pretended that he was a pensioner of Greenwich Hospital.

Over two hundred crimes were punishable by death.

The pillory, and the ducking stool for women, existed, and the whipping of women was permitted, till 1820.

Executions took place in public till 1868.

No appeal was allowed in a criminal case.

Punishment of Crime To-day

Present day punishments.

Punishments to-day are very different from what they were.

Some people think we have gone from the extreme of barbarism to somewhat weak sentimentality.

Four crimes punishable by death.

There are only four crimes now that can be punished by death. These are—(1) High treason. (2) Murder. (3) Piracy with violence.[1] (4) Setting fire to the King's ships, dockyards, arsenals or stores.

Transportation beyond the seas is abolished.

Whipping.

Men cannot be whipped for crime except in one or two exceptional cases, as for example under the Garotter's Act, and women can never be whipped.

Boys under sixteen may be whipped with a birch rod for various offences, but they cannot be sent to prison if very young (see *ante* p. 177).

First offenders need not be punished at all, but bound over to be of good behaviour in the future.

Borstal System.

A system, known as the "Borstal System," has been originated by which young persons, between the ages of sixteen and twenty-one, convicted of crime, may be detained in Borstal institutes for not less than two, nor more than three years. This punishment has been planned, more with the object of moral training and removing them from evil influences than for punishment.

The object of the makers of our criminal law is now to reform more than to punish.

Habitual criminals.

An Act of Parliament now allows judges to sentence *habitual criminals* to suffer detention, even after their term of penal servitude for the special offence has been served, again largely with the view of keeping them out of temptation.

Appeal now allowed.

Incredible as it seems, no person convicted of crime on indictment was allowed any right of appeal till 1908.

A person who went to law for a few pounds could generally, if dissatisfied with the decision, appeal, and sometimes carry on his appeal from court to court till the case reached the House of Lords, but if it was a question of life and death he had no appeal.

Now an appeal is allowed both on the ground of mistake in law, and mistake in fact, though to prevent trivial appeals, leave has sometimes to be obtained.

[1] Piracy is attacking and robbing ships at sea.

A convicted prisoner may also appeal, with leave of the court, against the sentence that has been passed upon him by the judge, but if he does this he runs some risk of having the sentence increased instead of reduced. Appeal from sentence.

This right of appeal is an entirely different thing from the power the King possesses to pardon crimes.

CHAPTER XX

THE ORDINARY COURSE OF A TRIAL

"Justice is simple; truth is easy." LYCURGUS

Procedure at trial of action.

WE purpose to conclude this book with a very short description of a trial at law.

A trial may be either a civil action or a criminal trial.

We take a civil action first, held before a judge and jury.

A party to an action, it must be remembered, can always conduct his own case if he chooses to do so.

Generally he feels unable to do so, and employs an advocate—either a barrister or a solicitor.

Course of a trial.

The advocate for the plaintiff, after the jury is sworn, *opens* the case, that is, tells the jury what the plaintiff claims, what his case is about, and what evidence he intends to call in support of it.

Having done this he calls his witnesses, generally beginning with the plaintiff.

The advocate for the defendant cross-examines the witness, *i.e.* endeavours to obtain from him what is favourable to his own side. The advocate for the plaintiff then re-examines him.

When all the plaintiff's witnesses have been called and examined, and cross-examined and re-examined, the plaintiff's case is closed.

The defendant's case.

Then the defendant's advocate has to say whether he calls witnesses.

If he does *not*, the plaintiff's advocate may address the jury again, and then the defendant's advocate makes his address to the jury, and thus gets the last word.

To get the last word to the jury is always regarded as an advantage.

If defendant's advocate calls witnesses, he opens his case to the jury, then calls his witnesses, who are each cross-examined by the plaintiff's advocate.

If witnesses are called for the defendant, this gives the plaintiff's advocate the right to the last word.

The summing up.

All the witnesses having been called, and the speeches made, the judge sums up the case to the jury.

He generally comments upon the evidence given on both sides, tells the jury what the issues or points in dispute between the parties are, tells them what is the law which applies to the case, and then leaves them to find their verdict.

The jury often retire from the court to consider the verdict in private.

The verdict.

When the verdict is given, the party in whose favour it is given asks the judge to give judgment in accordance with the verdict.

This he generally does, and the trial is ended, unless either party appeals.

Appeals cannot here be dealt with.

Criminal Trial

Trial of a criminal case.

The marine league.

The criminal courts have jurisdiction to try offences committed not only on English land, but within one marine league of the coasts of the country. The open seas, to the distance of a marine league, adjacent to the coasts of the United Kingdom, or any other parts of the King's dominions, are part of the King's dominions. If the offence is committed on a ship, even a foreign ship, it is said to be committed within the jurisdiction of the Admiral of England, and is triable in the English courts.[1]

Now we will shortly consider an ordinary criminal trial on indictment.

The grand jury, having found "A true Bill" on the indictment (see *ante* p. 33), the prisoner is placed at the

[1] Though this jurisdiction over the marine league is said to have existed from time immemorial, it was only first definitely declared in an Act of Parliament called the "Territorial Waters Jurisdiction Act," passed in 1878.

bar of the court, and called upon to say whether he pleads "guilty," or "not guilty" to the charge.

If he will not plead, a plea of "not guilty" is entered for him.

The common jury.

The common jury, which has to try the prisoner, is then sworn.

Either party may object to the jury or any member of the jury that is going to try the case, *i.e.* challenge the jury. A person objected to is generally not called, but the question may be tried whether he is a proper person to sit on the jury.

The juryman's oath is slightly different according to whether the prisoner is being tried for felony or misdemeanour.

Course of the trial.

Then the trial follows somewhat the same course as in a civil action (see *ante* p. 186). The witnesses are called and cross-examined.

If witnesses are called for the prisoner, this gives the last word to the advocate for the prosecution. If the prisoner does not call witnesses his advocate has the last word.[1]

Prisoner's evidence.

Until 1898 a prisoner was not usually allowed to give evidence himself, nor was his wife. He generally knew more about the matter than anyone else, and yet he was not permitted to say on oath what might have acquitted him.

This is now allowed, and a prisoner very often does give evidence on his own behalf. His wife also is a competent witness.

She cannot be compelled to give evidence, except in certain cases.

A prisoner who himself gives evidence is *not* regarded as a witness for the purpose of giving the prosecution the last word.

The verdict.

The judge sums up. The jury find the prisoner either "guilty" or "not guilty." They *must be unanimous* in their verdict. If they cannot possibly agree they are discharged, and the prisoner tried again by a fresh jury.

If the verdict is "guilty," the judge passes sentence. If the verdict is "not guilty," the prisoner is set free.

[1] There is one exception to this rule. Where the Attorney General or the Solicitor General conducts the prosecution, he always has the last word.

The Evidence

Evidence means the way in which a fact is proved. Evidence.

Legal evidence means evidence admitted to prove a fact in a court of justice.

Example.

A (a schoolboy) says he knows B has taken his bat and he will call C, another boy, to say he saw him take it. C's statement that he did see B take the bat is *evidence*, for it is some proof of the fact.

If C should be called on to say such a thing in court upon oath, this would be legal evidence.

Certain rules of law exist which decide what is legal evidence, and what is not. Rules of evidence.

Generally the rules of evidence are the same in civil or criminal cases.

The judge always decides whether evidence is admissible or inadmissible.

It is impossible, and would be useless, to discuss all the rules of evidence in this book.

A few of the leading principles only can be referred to.

The fundamental rule governing legal evidence is this—"The law requires *the best evidence* that is reasonably procurable." The leading rule.

Nearly all the rules of evidence are offshoots of this one principle.

Examples.

(1) It is necessary in a trial to know what A wrote to B. The advocate who wants to prove this says, "I have a copy of that letter, and I propose to read it." "No," says the advocate on the other side, "you can't do that—the letter itself is the *best* evidence of what it says." The copy is not evidence whilst the letter exists.

(2) In a trial for theft the advocate for the prosecution says, "I have a witness who heard a woman

say in a public house that she saw the prisoner commit the theft."

This would be at once objected to. It would be said, "We don't want the person who *heard* the woman say this, we want the woman who saw it herself. She is the *best* evidence."

Secondary evidence.

If the best evidence *cannot* be obtained, the law generally allows other evidence to be given. This is called "secondary evidence."

The law does not require, if the best evidence cannot be obtained, that what may be called the *next* best evidence should be produced. Any evidence in such a case is admissible.

Example.

The best evidence of the contents of a letter is the original letter itself. Suppose this is proved to have been burnt and that a copy made at the time of writing it is shown to exist, it may be said that this copy is the next best evidence of the contents of the letter. The law, however, says you may prove it by the copy, or in any other way.

Evidence relevant.

Evidence must be relevant, *i.e.* directed to prove or disprove some matter which is in dispute in the case.

Facts, not opinion.

A witness must give evidence as to facts, not opinions. He must say what he has seen or heard, but he cannot say what *his opinion is*, either as to who is right in a civil action, or whether a prisoner is or is not guilty.

Examples.

(1) A witness in an action for negligently driving a motor car is asked, "In your opinion was the driver driving negligently?" This question is not allowed. The witness may say at what rate the driver was driving, or how he was driving, but he must not give his own opinion as to whether it was negligent.

(2) A witness at a criminal trial is asked, "In your opinion did A intend to kill B?" This is inadmissible. He can say what A did to B, but it is for the jury to say whether the facts show an intention to kill.

Exception.

There is an exception even to this rule. If a person has had a special training in a science or art he may be asked his opinion, and his opinion is evidence. He is then called an "*expert* witness." Evidence of experts.

Examples.

(1) An expert in handwriting, who has made a study of comparisons of handwritings, may be asked, "In your opinion is this letter in the prisoner's handwriting?" He is an expert witness.

(2) A doctor may be asked, "You saw these injuries—were they in your opinion the result of an accidental fall, or were they inflicted deliberately?" Again he is an expert witness.

A lady, who had been sitting in court the greater part of a day, said to the writer, "Why do you always stop the witness just when he is going to say what we want to hear?"

The answer was "He was just going to say, not what he knew himself but something he had heard from someone else, or that someone else had said." Hearsay not allowed.

Hearsay is not evidence.

If a person was allowed to say what he heard outside the court, though it was quite untrue in fact, the witness could not be punished, for what *he* says is true, namely that he heard it.

Neither can the person from whom the information came in the first instance be tested by cross-examination, for he is not present.

For these reasons the law says—"We will not have hearsay evidence. We must have the person present who saw or heard the particular thing which the evidence is to prove."

Serjeant Buzfuz. Little to do and plenty to get I suppose?

Sam Weller. Oh quite enough to get, sir, as the soldier said ven they ordered him three hundred and fifty lashes.

The Judge. You must not tell us what the soldier or any other man said. It's not evidence.

"Pickwick Trial."

In this historic parody it will be seen not only that what the soldier said was hearsay, but also that the statement was not in any way relevant to the case that was being tried.

There are a few exceptions to this rule, all of a technical character.

Statements by parties themselves.

Statements made by the parties to an action *themselves* are evidence against them, and may be proved by anyone who heard the statements.

In the same way statements made by a prisoner can be given in evidence against him, but they must have been made voluntarily.

Things said in the presence of a party to an action, or in the presence of a prisoner, are not evidence against such party, but such party's demeanour or action on hearing such things may be evidence, for example, if he did not deny them.

Direct evidence.

A thing may be proved by "direct evidence," or by what is called "circumstantial evidence."

Direct evidence is that of witnesses who speak directly as to the fact to be established and, if their testimony is true, the fact is proved.

Circumstantial evidence.

Circumstantial evidence is that of witnesses who do not swear directly to the fact to be established, but prove certain circumstances from which it is reasonable to infer that the fact to be established is proved.

Examples.

(1) A prisoner is charged with stealing. A witness says he saw the prisoner take the watch secretly and run away with it. This is direct evidence. If it is true, the theft is proved.

(2) No better illustration of circumstantial evidence can possibly be given than is contained in Shakespeare's lines—

> "Who finds the heifer dead, and bleeding fresh,
> And sees fast by a butcher with an axe,
> But will suspect 'twas he that made the slaughter?"
>
> "Henry VI."

Here there is no direct evidence, no one saw the butcher kill the heifer, but look at the circumstantial evidence—the heifer newly bleeding, a butcher, the sort of person whose trade it is to kill heifers. He is standing near, and he is armed with the very weapon with which the slaughter of animals is generally performed. Good character.

The inference is almost irresistible, but it is all circumstantial evidence.

Evidence of Character

Though the parties to an action or any of the witnesses may be cross-examined to show that their character is bad, and consequently that they ought not to be believed, the parties cannot call witnesses to prove that their characters are good. The law assumes that every person has a good character till the contrary is shown. Bad character.

In criminal cases no evidence is permitted as to the prisoner's general bad character till after conviction.

The prisoner may call witnesses to prove that his general character is, or was good, but if he does so, the prosecution may try to show that the contrary was the case.

After, but never before, conviction, evidence of previous convictions may be given. This of course affects the sentence.

If the prisoner gives evidence on his own behalf (see *ante* p. 188) he cannot be cross-examined to show that he has previously been convicted or is of bad character, unless he sets up his own character as being good, or attacks the character of the witnesses against him. In this case he can be cross-examined as to his character. Burden of proof.

In almost every action the duty of showing that he is entitled to succeed rests on the plaintiff. This is called in law " the burden of proof."

Unless the plaintiff can show with reasonable certainty that the verdict or judgment ought to be in his favour, the defendant is entitled to succeed.

In a criminal trial the burden of proving the guilt of the prisoner rests on those who prosecute him.

If there is any reasonable doubt whether he is guilty, he is entitled by the law of England to be acquitted.

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